(1)

91-376

No. _____

In The

Supreme Court of the United States

October Term, 1991

MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORP., INC.,

Petitioners,

v.

GENERAL MOTORS CORPORATION, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, FAIRFAX GROUP LTD., AND FREDERICK PIROCHTA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDIX -

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER "*NOERR-PENNINGTON*" IMMUNITY IS AN AVAILABLE DEFENSE IN AN ACTION UNDER 42 U.S.C. § 1983, WHICH ALLEGES THAT DEFENDANTS, PRIVATE CORPORATIONS, INDUCED AND CONSPIRED WITH STATE GOVERNMENTAL OFFICIALS TO DESTROY PLAINTIFFS' BUSINESSES IN VIOLATION OF PLAINTIFFS' DUE PROCESS RIGHTS AND, IF THE DEFENSE IS RECOGNIZED IN AN ACTION UNDER 42 U.S.C. § 1983, WHETHER IT IS AN ABSOLUTE DEFENSE TO THE PLEADED CLAIMS SO AS TO JUSTIFY DISMISSAL PRIOR TO THE COMMENCEMENT OF DISCOVERY.

II.

WHETHER THE INDIVIDUAL DEFENDANTS, STATE EMPLOYEES, DEMONSTRATED THAT, "THEIR CONDUCT [DID] NOT VIOLATE CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN" SO AS TO JUSTIFY SUMMARY JUDGMENT, ON QUALIFIED IMMUNITY GROUNDS, PRIOR TO THE COMMENCEMENT OF DISCOVERY.

PARTIES TO PROCEEDINGS

Petitioners B&C CORP, INC., TRANS-4, INC., and M&E CORP, INC., are businesses which, at times relevant to this lawsuit, operated transmission repair facilities in Michigan as independent franchisees of American Transmissions, Inc.[1] Petitioners EMILIO DALOISIO and his wife, MARY DALOISIO, owned M&E CORP., INC. Petitioner MARIO BOSSIO owned B&C CORP., INC. and TRANS-4, INC.

Respondent GENERAL MOTOR CORPORATION[2] is a Delaware Corporation engaged in the design, manufacture, and sale of automobiles with its principal place of business in Detroit, Michigan. Respondent FAIRFAX GROUP, LTD. is a Virginia Corporation involved in investigatory activities for General Motors. TRANSMISSIONS BY LUCILLE, INC. is a Pennsylvania Corporation, owned and operated by LUCILLE TREGANOWAN. These are collectively referred to as the "non-governmental" Defendants or Respondents.

Respondents WALTER CURTIS and FREDERICK PIROCHTA were employees of the Michigan Bureau of Automotive Regulations. Curtis and Pirochta are referred to as the governmental Defendants or Respondents.

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[1] John F. Folino is the President and a founder of American Transmissions, Inc., the franchisor. Mr. Folino, American Transmissions, American Transmissions Land Co., Inc., Jay Enterprises, Inc., J J & T, Inc., Commercial Transmissions, Inc., Joyce Folino, John A. Folino, and Thomas A. Folino (collectively referred to as the "Folino group") were parties to proceedings in the District Court and Court of Appeals. Members of the "Folino group" are not participants in this Petition for Writ of Certiorari, but are expected to file their own Petition.

Pentco Enterprises, Inc., William Arim, and Robert Titta were also engaged in transmission repair businesses in Michigan. They are not related to the Folino group or to Petitioners, and were not parties to Petitioners' action in the District Court.

The *Pentco* appeal was consolidated with that of Petitioners by the Sixth Circuit Court of Appeals, presumably because the two cases involved similar legal issues. The *Pentco* parties are not participants in this Petition for Certiorari, but may be filing their own Petition.

[2] All Defendants in Petitioners' action in the District Court and Court of Appeals are Respondents in this Court.

DISCLOSURE OF PARENT COMPANIES AND SUBSIDIARIES

Petitioners have no parent companies or subsidiaries.

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OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals, affirming the dismissal of Petitioners' action under 42 U.S.C. § 1983, is unreported. It is found in the Appendix at A-1–A-2.

The Opinions and Orders of the United States District Court for the Eastern District of Michigan, Southern Division, Hon. Patrick J. Duggan, are likewise unreported. Reproduced in the Appendix are the Opinion (A-3–A-16) and Order (A-16) which dismissed all claims against the non-governmental Respondents; the Opinion and Order which amended the prior ruling and remanded the state law claims to state court (A-17–A-21); the Opinion and

Order denying Respondents' motion for rehearing on the remand of state law claims to state court (A-22–A-24); and the Opinion (A-25–A-33) and Order (A-33) granting summary judgment to the governmental Respondents on the action under 42 U.S.C. § 1983 and remanding the state law claims to state court.

SUPREME COURT JURISDICTION

The Opinion of the Court of Appeals was issued June 4, 1991. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment of the Constitution of the United States, Section 1:

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE[3]

Underlying Facts

This case originates in proceedings before the Federal Trade Commission ("FTC") involving the THM (turbo-hydromatic) 200 transmission, an allegedly defective transmission used by Respondent GENERAL MOTORS in

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[3] The rulings of the lower courts have dismissed Petitioners' suit under 42 U.S.C. § 1983 on the pleadings, with no discovery. As the procedural posture of the case has foreclosed the development and production of evidence, there is no formal record.

Accordingly, this Statement of the Case summarizes the allegations of the Complaint (A-34–A-47), which are to be accepted as true for present purposes. *Neitzke* v. *Williams*, 490 U.S. 319, 326-327; 109 S. Ct. 1827; 104 L.Ed.2d 338, 348 (1989); *Kugler* v. *Helfant*, 421 U.S. 117, 125; 95 S. Ct. 1524; 44 L.Ed.2d 15, 25, fn. 5 (1975).

The Statement of the Case also draws upon documents and information obtained through informal discovery or in collateral litigation involving Respondents or the State of Michigan. Many of these evidentiary items were attached as Exhibits to Petitioners' pleadings in the District Court.

various passenger car models sold in the United States in the 1970's. The FTC proceedings resulted in a Consent Decree (A-48–A-76), issued November 15, 1982, which established an arbitration program, under the auspices of the Better Business Bureau, for the resolution of consumer complaints about defective THM 200 transmissions.

Traditionally, consumers requiring repairs or maintenance on General Motors transmissions would patronize either a General Motors dealership or independent transmission repair facilities, typically franchise facilities such as those operated by Petitioners. After the Consent Decree, owners of General Motors autos who took their cars to independent facilities for work on THM 200 transmissions would typically be advised of their rights under the Consent Decree. As a result of the information provided to customers by transmission franchises and others, General Motors paid an estimated $40,000,000 to consumers under the Consent Decree during the 1982-1985 era. In retaliation, General Motors launched the campaign to destroy franchise transmission businesses which is the subject of this lawsuit.

During the early stages of the campaign (late 1985), General Motors persuaded the Bureau of Automotive Regulations (BAR) in its home state, Michigan, to conduct an investigation of franchise transmission facilities. Initially, the BAR took vehicles to franchise facilities, in response to advertisements for low-priced transmission tune-ups, apparently hoping to uncover "bait and switch" practices. This phase of the investigation revealed no wrong-doing (see *e.g.* A-77–A-79).

Undaunted, Respondents then solicited Fairfax Group, Ltd., Transmissions by Lucille, and the BAR to join it in "Operation Shifty". General Motors served as "Head-

quarters" for Operation Shifty, but it was agreed that its involvement would be concealed.[4]

"Operation Shifty" entailed the use of automobiles chosen and provided by General Motors, which paid Transmissions by Lucille to adulterate the transmission pans with used transmission fluid taken from unknown vehicles, sedimentary debris,[5] and graphite.[6] With the transmissions altered in this fashion, BAR investigators were dispatched to franchise transmission facilities, where they gave false cover stories and asked to have their transmissions inspected. Facilities in which the mechanic, after seeing and relying on the doctored transmission pans, performed additional work in conformity with the pan's appearance, were then charged with violations of the Michigan Motor Vehicle Service and Repair Act. "Operation Shifty" yielded no charges against Petitioners.

The BAR administrative action commenced against various transmission franchisees on August 11, 1986. This was carefully orchestrated to coincide with a press conference scheduled for August 12th. State officials then issued a

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[4] For example, a State Memorandum of March 14, 1986, notes the joint undertaking and the General Motors request "that this matter be treated as confidential to avoid publicity". Another State Memorandum of one month later documents the continued effort to cover up the involvement of General Motors which, "is concerned that we do nothing to alert the press or the general public of its involvement (and the extent of this involvement)".

[5] Fresh transmission fluid is red in color. During ordinary usage, it becomes gray and accumulates a small amount of particulate matter. If the moving parts which form the inner workings of the transmission grind against each other, they produce metal shavings, friction materials, or debris which collect in the transmission pan. To the mechanic, the presence of excessive debris in the transmission pan is indicative of wear or damage to the internal moving parts.

[6] The appearance of graphite was described by Ms. Treganowan: "It looks like mud". The addition of graphite to the transmission pan effectively deceives the mechanic into believing that there are transmission problems which do not in fact exist.

press release which reported that "our mechanics examine[d] the transmissions of several cars and put the transmissions in perfect working order." In the release, press conference and other publicity, it was falsely claimed that 98% of the repair costs were unnecessary. It was publicly claimed that the culprits were "franchise transmission repair facilities" or "transmission repair chains". As to General Motors (which was not investigated) the press release states, "most automobile dealers' service facilities . . . operate within the law and provide good service".

Due to these events, franchise transmission shops which were never even charged with misconduct were shunned by the public and were driven out of business. In the process, the objectives of General Motors were satisfied: its dealerships presumably obtained the transmission work that was previously performed by independent facilities, and payments to consumers under the Consent Decree were reduced.

The Course Of The Lawsuit

The Complaint (A-34–A-47) was filed against Respondents in Wayne County Circuit Court, the Michigan state court of competent jurisdiction.[7] In addition to state law causes of action, the Complaint (Count I) alleges a cause of action under 42 U.S.C. § 1983 asserting, in substance, that the non-governmental and governmental Defendants-Respondents conspired and acted in concert, under color of State law, to deprive Petitioners of their property and liberty interests in their businesses without substantive or procedural due process of law as guaranteed by the Fourteenth Amendment.

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[7] A similar action was filed against the State of Michigan and its agencies. As required by Michigan law, MCLA 600.6419(1)(a), suits against the State must be filed in the Michigan Court of Claims. The Court of Claims has denied the Motion for Summary Disposition filed by the State, a ruling which is currently the subject of an interlocutory appeal pending in the Michigan Court of Appeals.

The case was removed to the United States District Court for the Eastern District of Michigan, Southern Division, on the basis of federal question jurisdiction. The non-governmental Respondents then filed a Motion to Dismiss, citing Fed. R. Civ. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). In pertinent part,[8] it was claimed that the "*Noerr-Pennington* doctrine"[9] provided the non-governmental Respondents with immunity from the § 1983 action asserted.

The District Court concluded that *Noerr-Pennington* immunity, grounded in the First Amendment, immunized a private party's "efforts to influence administrative agencies", "even if prompted by an anti-competitive intent", "from claims brought under . . . section 1983" (Opinion of February 9, 1990, A-7). The Court further concluded that the pleaded conspiracy between Respondents was subject to *Noerr-Pennington* immunity because Petitioners had failed to plead that the governmental co-conspirators "had some selfish or otherwise corrupt motive in siding with [General Motors]" [*Id.*, A-11]. Finally, the District Court held that the pleaded facts did not fall within the "sham exception"

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[8] Respondents also asserted that State administrative proceedings involving the Folino group collaterally estopped Petitioners from maintaining their action, and that Petitioners had suffered no cognizable constitutional deprivation. The District Court rejected both of these arguments [Opinion of February 9, 1990, fn. 5; A-13]. The District Court also rejected Respondents' argument that it should dismiss the state law claims rather than remanding them to state court.

These rulings have remained undisturbed by the Court of Appeals. As a result, the issues here presented are narrowly framed: the applicability of *Noerr-Pennington* immunity to: (1) an action under 42 U.S.C. § 1983, (2) which pleads an otherwise cognizable deprivation of rights guaranteed by the Fourteenth Amendment, (3) brought by one who has not been charged with misconduct in state proceedings.

[9] The "*Noerr-Pennington*" doctrine is so named because it finds its genesis in two decisions by this Court: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127; 81 S. Ct. 523; 5 L.Ed.2d 464 (1961) ("*Noerr*") and *United Mine Workers v. Pennington*, 381 U.S. 657; 85 S. Ct. 1585; 14 L.Ed.2d 626 (1965) ("*Pennington*").

to immunity or show that Respondents' conduct "went beyond constitutionally protected 'petitioning' of the government" [*Id.*, A-11]. The Court of Appeals affirmed, without independent analysis, "for the reasons set forth [by the District Court]."

The District Court also dismissed the § 1983 action against the governmental Defendants, Respondents Curtis and Pirochta. The Court concluded that they were entitled to "qualified immunity" under the standards of *Harlow v. Fitzgerald*, 457 U.S. 800; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982) because, in the Court's view, "a reasonable person could have believed that the conduct plaintiff now complains of was lawful, taking into consideration all of the information the defendants possessed and the preexisting judicial interpretation of the Due Process clause" (Opinion of June 26, 1990, A-28–A-32). The Court of Appeals upheld the dismissal of Petitioners' claims against Curtis and Pirochta.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AND THE EXTENT TO WHICH, THE "*NOERR-PENNINGTON*" DOCTRINE (PREDICATED ON THE FIRST AMENDMENT RIGHT TO PETITION) PROVIDES IMMUNITY IN AN ACTION BROUGHT UNDER 42 U.S.C. § 1983 TO REDRESS NON-GOVERNMENTAL RESPONDENTS' ACTIVITIES WHICH HAVE DENIED PETITIONERS DUE PROCESS RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

As initially conceived by this Court, the *Noerr-Pennington* doctrine provided a defense to a statutory, Anti-Trust action. The underpinnings for the *Noerr-Pennington*

doctrine were the Court's statutory interpretation of the Sherman Anti-Trust Act (15 U.S.C. § 1, *et seq.*, the statute providing the cause of action asserted in both *Noerr* and *Pennington*), and policies implicated in First Amendment "petition" rights. To the extent that *Noerr-Pennington* immunity is an outgrowth of First Amendment rights, the reach of the Sherman Anti-Trust Act is, of course, limited by the Constitution.

This case, however, involves an action brought under 42 U.S.C. § 1983, a separate statute with separate language subject to a separate interpretation. More significantly, § 1983 in general,[10] and this case in particular, *themselves* seek redress of rights derived from the Constitution. In such a case, the interplay is not between the Constitution and a statute (as in the anti-trust context of *Noerr* and *Pennington*), but between two protections conferred by the same Constitution. It is the conflict between the putative First Amendment rights asserted by Respondents and the Fourteenth Amendment rights of Petitioners which shapes the question presented. Petitioners submit that, in this context, the "petition" rights of Respondents are not absolute (as the lower courts effectively held), but must accommodate the Fourteenth Amendment rights of Petitioners. This Court should grant certiorari to consider the applicability of *Noerr-Pennington* immunity to a § 1983 suit which itself seeks redress for constitutional deprivations.

A. The Origin Of The *Noerr-Pennington* Doctrine

Noerr was a suit, brought under the Sherman Act, by truck operators who complained that their competitors, the railroad industry, had undertaken "a publicity campaign

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[10] Petitioners' argument assumes a § 1983 action seeking redress for constitutional violations. The Court need not address the applicability of *Noerr-Pennington* immunity to a § 1983 suit alleging infringements of non-constitutional federal law which are also within the reach of § 1983.

against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive to the trucking business" (365 U.S. at 129). Following a trial on the merits (365 U.S. at 132), this Court granted review. Writing for the Court, Justice Black began his analysis by discussion of the Sherman Act, "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws" (365 U.S. at 135). This precept was said to reflect that, "under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government *so long as the law itself does not violate some provisions of the Constitution*" (365 U.S. at 136; emphasis supplied).

The *Noerr* Court declined to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act" (365 U.S. at 137; footnote omitted). It did so because, in part, "such a construction of the Sherman Act would raise important constitutional questions [implicating] [t]he right of petition[,] one of the freedoms protected by the Bill of Rights" (365 U.S. at 138). On this basis, the Court concluded that, "the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised the mere solicitation of governmental action with respect to the passage and enforcement of laws" (365 U.S. at 138).

Finally, the Court concluded that the activities which transcended "the mere solicitation of governmental action" were likewise not actionable under the Sherman Act. The railroads' intent "to destroy the truckers as competitors for the long distance freight business" (365 U.S. at 138) was deemed not to "transform conduct otherwise lawful into a violation of the Sherman Act" (365 U.S. at 138-139), because "[i]t is neither unusual nor illegal for people to

seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors" (365 U.S. at 139) and, "it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act" (365 U.S. at 139).

In so ruling, the Court made it clear that there was no evidence that the railroads' legislative activities in *Noerr* were a "sham" (365 U.S. at 475):

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here."

Pennington was a suit against the United Mine Workers, claiming that the union had violated the Sherman Act by conspiring with large coal operators to negotiate labor agreements which impaired the ability of smaller coal producers to compete. This occurred when (381 U.S. at 660):

> "The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, as amended 49 Stat 2036, 41 USC § 35 et seq. (1958 ed), of a minimum wage for employees of contractor selling coal to the TVA, such minimum being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market."

As in *Noerr*, the *Pennington* case proceeded to trial on the merits (381 U.S. at 661). Supreme Court review followed.

The *Pennington* verdict was reversed for instructional error. The instructions were deemed erroneous because, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose" (381 U.S. at 670). In the view of the *Pennington* Court, "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." The damage instructions were also deemed infirm in allowing recovery for losses sustained as a result of *independent* government conduct: "the action taken to set a minimum wage for government purchases of coal was the act of a public official *who is not claimed to be a co-conspirator*, and the jury should have been instructed, as was requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations" (381 U.S. at 671; emphasis supplied; footnote omitted).

While the *Pennington* Court reversed the verdict on instructional grounds, it *did not* immunize the defendants from liability. To the contrary, the Court held that the union *could* be held liable and that its motions for directed verdict and judgment notwithstanding the verdict were correctly denied (381 U.S. at 661-668).

To summarize the relevant holdings of *Noerr* and *Pennington*, anti-trust statutes[11] are not to be construed as imposing liability for non-"sham" attempts to influence the passage or enforcement of laws, where the solicited governmental activity "does not violate some provision of the Constitution", and the governmental official "is not claimed to be a co-conspirator", a determination made fol-

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[11] Later decisions of this Court adverting to *Noerr* and *Pennington* have likewise involved liability under the anti-trust laws. See *e.g. Columbia v. Omni Outdoor Advertising*, 449 U.S. ___, 111 S. Ct. ___; 113 L.Ed.2d (1991) (Sherman Act); *Allied Tube Corp. v. Indian Head*, 486 U.S. 492; 108 S. Ct. 1931; 100 L.Ed.2d 479 (1988) (Sherman Act); *California Transport v. Trucking Unlimited*, 404 U.S. 508; 92 S. Ct. 609; 30 L.Ed.2d 642 (1972) (Clayton Act).

lowing trial on the merits. *Noerr* and *Pennington* do not address: (1) the availability of the pre-discovery dismissal of, (2) a cause of action under 42 U.S.C. § 1983, (3) where the outgrowth of the conspiracy is "violat[ion] [of] some provisions of the Constitution."

B. A Conspiracy Between Governmental And Non-Governmental Entities To Deny Rights Guaranteed By The Fourteenth Amendment Is Actionable Under 42 U.S.C. § 1983.

Subsequent to *Noerr* and *Pennington*, this Court addressed the reach of 42 U.S.C. § 1983 in *Adickes v. Kress & Co.*, 398 U.S. 144; 90 S. Ct. 1598; 26 L.Ed.2d 142 (1970). In that case, petitioner, a white civil rights worker, was refused service at respondent's restaurant while in the company of Negro students from a Mississippi "Freedom School". In reversing a summary judgment for the restaurant, this Court, per Justice Harlan, concluded that it was possible that an agreement has been reached between the arresting officer and respondent that petitioner would be denied service and arrested. The Court made it clear that a private party, which influenced a public official to engage in conduct violative of Fourteenth Amendment rights, could be held liable under § 1983 (398 U.S. at 152):

> "Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; *Monroe* v *Pape*, 365 US 167, 5 L Ed 2d 492, 81 S Ct 473 (1961); see *United States* v *Classic*, 313 US 299, 326, 85 L Ed 1368, 1383, 61 S Ct 1031 (1941); *Screws* v *United States*, 325 US 91, 107-111, 89 L Ed 1495, 1505-1507, 65 S Ct 1031, 162 ALR 1330 (1945); *Williams* v *United States*, 341 US 97, 99-100, 95 L Ed 777, 778 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with the state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State of its agents,' *United States* v *Price*, 383 US 787, 794, 16 L Ed 2d at 267, 272, 88 S Ct 1152 (1966)."

The import of *Adickes* is that a § 1983 remedy *is* available against a non-governmental party which has conspired with or solicited a public official to enforce the law in a fashion which denies rights protected by the Fourteenth Amendment. The ruling below would effectively nullify *Adickes* by applying *Noerr-Pennington* immunity to the very acts of solicitation that give rise to § 1983 liability under *Adickes* principles. It is this very conflict which should be resolved by the Court.

C. This Court Should Grant Certiorari To Review The Lower Courts' Application Of *Noerr-Pennington* Immunity To An Action Under 42 U.S.C. § 1983 Seeking Redress For Fourteenth Amendment Violations.

Many lower courts, like the District Court in this case, have applied *Noerr-Pennington* analysis to non-anti-trust actions, even those brought under § 1983. See *e.g. Westborough Mall v. City of Cape Girardean, Mo.*, 693 F.2d 733, 745-746 (8th Cir., 1982); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-1344 (7th Cir., 1976); *Video Intern. Production v. Warren-Amex Cable Com.*, 858 F.2d 1075 (5th Cir., 1988). This approach is criticized in the article "The Misapplication of the *Noerr-Pennington* Doctrine in Non-Antitrust Right to Petition Cases", 36 Stanford L. Rev. 1243 (1984).

An initial flaw in the lower courts' analysis lies in their construction of *Noerr* and *Pennington* as creating a constitutional defense to all causes of action. *Noerr* and *Pennington* were predicated on the statutory construction afforded the Sherman Act. They do not on their face, nor can they be construed to, impose a limiting construction on 42 U.S.C. § 1983.

Indeed, the civil rights statute is couched in terms which bespeak a Congressional intent to give § 1983 the broadest possible reach. Liability is imposed, on, "[e]very *person* who . . . causes to be subjected [another] to the deprivation of *any* rights . . . secured by the Constitution" (emphasis supplied). Simply as a matter of statutory construction, nothing in § 1983 even remotely recognizes the immunity decreed by the lower courts.

The most that can be said about the constitutional underpinnings of *Noerr* is that the Court's construction of the Sherman Act was influenced by the fact that "important constitutional questions" involving "The rights of

petition" would arise from a different construction of the anti-trust laws (365 U.S. at 138). No definitive First Amendment principles emerge from the *Noerr* decision, which does not even raise, much less decide, whether "The right of petition" creates some species of anti-trust or § 1983 immunity.

Moreover, granting that the claims raised by Petitioners implicate the "right of petition", it scarcely follows that any immunity, especially a near absolute immunity, must be recognized. Even where First Amendment rights are involved, they are not absolute. Notwithstanding legitimate First Amendment concerns, the law may provide a remedy where countervailing interests dictate. See *e.g. Barnes v. Glen Theatre, Inc.*, 501 U.S. __; 111 S. Ct. __; 115 L.Ed.2d 504, 511-512 (1991) (ban on nude dancing upheld despite impact on freedom of expression); *Employment Division, Oregon Dept. of Human Resources v. Smith*, 494 U.S. __; 110 S. Ct. 1595; 108 L.Ed.2d 876, 885-590 (1990) (upholding criminal laws prohibiting peyote use despite impact on free exercise of religion).

This Court's Petition Clause jurisprudence confirms that the right to petition is not absolute. In *McDonald v. Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L.Ed.2d 384 (1985), the Court upheld the District Court's decision "that the Clause does not grant absolute immunity from liability for libel" arising out of communication "within the general protection afforded by the petition clause" (472 U.S. at 482).

As *McDonald* makes clear, invocation of the Petition Clause does not preclude the imposition of liability for tortious conduct (472 U.S. at 390):

> "To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideas of liberty and

> democracy that gave us the freedoms to speak, publish, and assemble. See *Mine Workers* v *Illinois Bar Assn.* 389 US 217, 222, 19 L Ed 26 426, 88 S Ct 353 (1967). These First Amendment rights are inseparable. *Thomas* v *Collins*, 323 US 516, 530, 89 L Ed 430, 65 S Ct 315 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."
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> * * *
>
> "We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not."

The rulings below are fundamentally inconsistent with *McDonald*. If the interests underlying the common law of libel are sufficiently weighty to foreclose "petition"-based immunity (as *McDonald* holds), surely the interests embodied in § 1983 and the Fourteenth Amendment are likewise not to be subordinated to "petition" concerns.

Consider the anomaly created by the rulings below. Petitioners have had their business destroyed in part because of their own "petition" activities in assisting consumers obtain redress through the program established by the General Motors-FTC Consent Decree. How is it that Respondents' "petition" rights require that Petitioners sacrifice a § 1983 remedy to vindicate *their* "petition" rights? By what reasoning can it be said that the Petition Clause of the Constitution forecloses Congress from providing § 1983 relief to those deprived of Due Process rights guaranteed by the Fourteenth Amendment of that very Constitution? These are the thorny issues presented by the decisions below which should be resolved by this Court.

The suggested resolution would recognize that the Petition Clause does not permit one to deny another rights

conferred by the Constitution. Stated differently, the Congressional creation of a § 1983 remedy for the innocent victim of constitutional deprivations is sufficiently weighty to overcome the wrongdoer's putative right to "petition" government to inflict the constitutional deprivation. This is the very outcome suggested by the limitation in *Noerr* (365 U.S. at 136), that one may petition for enforcement of the law "*so long as the law itself, does not violate some provision of the Constitution.*"

Even if the Court were to conclude that First Amendment petition rights may be invoked by a § 1983 defendant who has caused the plaintiff to be deprived of due process rights, this would not end the inquiry. Under that approach, it would be necessary to balance the wrongdoer's Petition claim against the rights of victim which have been denied.

In *Noerr* and *Pennington*, the judicial review function was performed on the basis of the full record produced at a thorough trial. In this fashion, the Court was able to assess the *particular* conduct which was claimed to fall within the purview of the Petition Clause. Here, in contrast, the case was summarily dismissed under Rule 12(b)(6) before discovery even began. On this procedural point, the Court could properly reverse the order of dismissal so that the case may proceed through the discovery process to allow an *informed* assessment of the Defendant's conduct and its impact on the constitutional rights of the Claimant. Only then can a court correctly weigh the competing constitutional interests implicated.

Finally, even if one were to accept that a § 1983 suit is subject to *Noerr-Pennington* analysis, and even if one were to grant that such an analysis may be performed in the "failure to state a claim" context, the allegations presented by this case are sufficient to plead a viable § 1983 action. Even under traditional *Noerr-Pennington* standards, the

Complaint, fairly construed,[12] sets forth a cause of action from which Defendants should not be immune.

The decision below rests in large part on the view that no consequence may be attached to the fact that Respondents' activities were intended to drive transmission franchisees out of business for General Motors' own economic purposes (removing independent transmission chains as competitors to General Motors dealerships and avoiding compensation to consumers under the FTC Consent Decree). While that view concededly finds some support in the language of *Noerr*, one must seriously question that proposition in view of more recent decisions which limit the scope of the First Amendment where the "speech" is commercial in nature. See *e.g. Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456; 98 S. Ct. 1912; 56 L.Ed.2d 444, 453-454 (1978).

In *California Transport v. Trucking Unlimited*, 404 U.S. 508; 92 S. Ct. 609; 30 L.Ed.2d 642 (1972), this Court expressed similar sentiments in an Anti-Trust case where it

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[12] The controlling standards were correctly recited by the trial court in his Opinion of February 9, 1990, A-5–A-6:

> "A 12(b)(6) motion tests the legal sufficiency of a complaint, not the facts that support it. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1356, p. 590 (West 1969). In practice, then,
>
> > when evaluating a motion to dismiss brought pursuant to rule 12 (b)(6), the factual allegations in the complaint must be regarded as true. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75, 86 S. Ct. 347, 348-349, 15 L.Ed.2d 247 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove not set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).
>
> *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). *See also Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987), *citing Windsor*."

was claimed that the defendants entered into a conspiracy, "the aim and purpose [of which] was 'putting their competitors, including plaintiff, out of business . . .'" (404 U.S. at 511). Rejecting the defendants' invocation of the *Noerr-Pennington* doctrine (404 U.S. at 513-515), the Court stated:

> "Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the anti-trust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney v Empire Storage Co.*, 336 US 490, 93 L Ed 834, 69 S Ct 684."
>
> * * *
>
> "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (see *NAACP v Button*, 371 US 415, 444, 9 L Ed 2d 405, 424, 83 S Ct 328) which the legislature has the power to control."
>
> * * *
>
> "If the end result is unlawful, it matters not that the means used in violation may be lawful."

In *California Transport*, the Court addressed the unavailability of Rule 12(b)(6) dismissal in a case such as this:

> "What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion. *Walker Process Equipment v Food*

> *Machinery & Chemical Corp.* 384 US, at 174-175, 15 L Ed 2d at 249, 250. On their face the above-quoted allegations come within the 'sham' exception of the *Noerr* case, as adapted to the adjudicatory process."

More recently, in *Allied Tube Corp*, 486 U.S. 492; 108 S. Ct. 1931; 100 L.Ed.2d 497 (1988), the Court again rebuffed the notion that *Noerr* and *Pennington* provided absolute immunity from liability arising out of economically-motivated misconduct. The Court noted that, in contrast to the political efforts to petition legislators involved in *Noerr*, commercial activities are not immune from anti-trust laws (486 U.S. at 504-507):

> "A misrepresentation to a court would not necessarily be entitled to the same anti-trust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified—nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.
>
> What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity makes it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."
>
> * * *
>
> "[T]he antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact".

The case at bar presents facts substantially comparable to *California Transport* and *Allied Tube Corp*. Much like the motive of the wrongdoers in *California Transport*, Respondents here were motivated by the desire to silence or

penalize Petitioners and other franchise transmission businesses for the assistance given to consumers in asserting rights available under the Consent Decree, a motive accompanied by deceptive misrepresentations. Like the defendant in *Allied Tube Corp.*, Respondents here were not involved in any partisan legislative activities. Rather, they attempted to manipulate the administrative process for purely economic, anti-competitive ends. As in *California Transport* and *Allied Tube*, even under a tradition *Noerr-Pennington* analysis, Petitioners' Complaint states a cause of action from which Respondents are not immune.

The ruling below intimates that Petitioners' allegations of conspiracy are not actionable because they have failed to plead that the State officials "has some selfish or otherwise corrupt motive in [assisting General Motors]" (Opinion of February 9, 1990, A-11). In the anti-trust context, this Court has rejected that approach on the ground that the Sherman Act is inapplicable to the acts of the State regardless of the motives of governmental officials. *Columbia v. Omni Outdoor Advertising*, 499 U.S. __; 111 S. Ct. __; 113 L.Ed.2d 382, 394-397 (1991).

Once more the lower courts have ignored § 1983 jurisprudence in woodenly importing anti-trust law into civil rights litigation. As *Adickes* makes unmistakable, for § 1983 purposes, private parties who induce governmental action *are* liable; indeed, state action ("color of law") is the very essence of § 1983 liability, the *sine qua non* of the cause of action. That governmental action is beyond the reach of the Sherman Act scarcely immunizes these Respondents for § 1983 liability for misconduct under color of law.

Moreover, the liability of a non-governmental co-conspirator under § 1983 does *not* depend on whether its fellow governmental participant is subject to liability. Thus, the absolute § 1983 immunity of a state judge does not preclude suit against a private defendant who conspires with

the immunized judge. *Dennis v. Sparks*, 449 U.S. 24; 101 S. Ct. 183; 66 L.Ed.2d 185 (1980).

Petitioners urge the Court to grant certiorari to consider whether, and to what extent, *Noerr-Pennington* principles immunize a non-governmental defendant from liability for conduct which is actionable under § 1983 and *Adickes*. Under the approach discussed above or traditional analysis, Petitioners have asserted a justifiable cause of action sufficient to survive a Rule 12(b)(6) motion.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE TRIAL COURT'S SUMMARY JUDGMENT ON "QUALIFIED IMMUNITY" GROUNDS.

In dismissing the claims against the governmental Defendants, the trial court did not specify whether his ruling was predicated on Rule 12(b)(6) ("failure to state a claim upon which relief can be granted") or Rule 56(c) ("no genuine issue as to any material fact"). In either event, there are substantial threshold procedural problems with the ruling.

"Qualified immunity" is an affirmative defense which the *defendant* bears the burden of raising by appropriate pleading. *Gomez v. Toledo*, 447 U.S. 635, 640-641; 100 S. Ct. 1920; 64 L.Ed.2d 572, 578 (1980); *Harlow v. Fitzgerald*, 457 U.S. 809, 815; 102 S. Ct. 2727; 73 L.Ed.2d 396, 408 (1982); *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir., 1986). To the extent that the trial court believed that *plaintiffs* were required to plead the absence of qualified immunity "to state a cause of action upon which relief can be granted", the Court misconceived the affirmative nature of a "qualified immunity" defense. Simply put, Rule 12(b)(6) assesses the facial sufficiency of the Complaint itself, not the ability of the plaintiff to anticipate and plead

in avoidance of an affirmative defense which may or may not be asserted.

While Rule 56 may concededly be invoked in the "qualified immunity" context, it is dubious that a Rule 56 motion should be decided prior to even the commencement of discovery, particularly in a complex case such as this, where the proof of the full extent of the relevant conduct lies in the hands of the defendant. As the Court has observed in *Scheuer v. Rhodes*, 418 U.S. 232, 250; 94 S. Ct. 1683; 40 L.Ed.2d 90, 104-105 (1974) [which was cited with approval in *Harlow*, 457 U.S. at 807; 73 L.Ed.2d at 403] and *Anderson v. Creighton*, 483 U.S. 635; 107 S. Ct. 334; 97 L.Ed.2d 523, 535, fn. 6 (1987), immunity questions turn on the factual nature of the misconduct. Consistent with this approach, in *Green v. Carlson* 826 F.2d 647, 652 (7th Cir. 1987), the Seventh Circuit recognized that a defendant can prevail only by satisfying traditional summary judgment standards. The Sixth Circuit adopted the same approach in *Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988):

> "[S]ummary judgment would not be appropriate if there is a factual dispute (*i.e.*, a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. *Ibid.* In either event, the case will then proceed to trial . . ."

Absent even the most preliminary discovery, it is impossible to say precisely what *are* the "acts" of Pirochta and Curtis, much less whether these unknown acts violated clearly established rights. The dismissal was, at best, premature.

Procedural points aside, under *Harlow*, immunity is limited to circumstances in which the officer's conduct, "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". It

is not necessary for the Plaintiff to show that "the very act in question was previously held unlawful," it is enough "that in the light of pre-existing law the unlawfulness must be apparent". *Anderson v. Creighton*, 483 U.S. 635; 107 S. Ct. 3034; 97 L.Ed.2d 523, 531 (1987).

Certainly, "in the light of the pre-existing law", it was "apparent" that Petitioners' liberty interests in their business were substantial, and could be interfered with only in a fashion consistent with due process guarantees. More than twenty years ago, in *Detroit v. Mashlakjian*, 15 Mich App 236, 240; 166 N.W.2d 493 (1968), the Michigan Court of Appeals summarized what has been long "apparent":

> "The right to earn a living is among the greatest of human rights and when lawfully pursued, cannot be denied. It is the common right to every citizen to engage in any honest employment he may choose, subject only to such reasonable regulations as are necessary for the public good. Due process of law is satisfied only by such safeguards as will adequately protect these fundamental, constitutional rights of the citizen. Where the state confers a license to engage in a profession, trade or occupation, not inherently inimical to the public welfare such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before a unbiased tribunal."

The most fundamental precepts of due process — notice and an opportunity to be heard — have been apparent for years. These Petitioners have *never* had any hearing on Respondents' charge that they and other Michigan transmission franchisees were dishonest while General Motors dealerships were the epitome of honesty. This Court should review the lower courts' construction of "qualified immunity" which holds that the procedural due process implica-

tions of Respondents' conduct were not sufficiently "apparent" by 1985.

The due process implications of Respondents' conduct has likewise been long apparent. *Wisconsin v. Contantineau*, 400 U.S. 433; 91 S. Ct. 507; 27 L.Ed.2d 515 (1973) and *Paul v. Davis*, 424 U.S. 693; 96 S. Ct. 1155; 47 L.Ed.2d 405 (1976), which provide the basis for the trial court's holding that a Fourteenth Amendment violation may be found on these facts, had been the law of the land for ten years at the time of Respondents' conduct. Although the unique facts of this case, like every case, may be unique, *Anderson* does not allow one "free bite", for it is unnecessary to show that "the very act in question was previously held unlawful". The Court should grant certiorari to consider the trial court's construction of § 1983 "qualified immunity" in the absence of any factual predicate for determining *what* precise acts are immunized.

In sum, Petitioners ask this Court to grant certiorari to consider the significant issues of constitutional law presented.

Respectfully submitted,

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Dated:
August 29, 1991

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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(United States Court of Appeals — Sixth Circuit)

(Filed June 4, 1991)

(AMERICAN TRANSMISSIONS, INC., ET AL., and PENTCO ENTERPRISES, INC., ET AL., Plaintiffs-Appellants, v. GENERAL MOTORS CORPORATION, ET AL., Defendants-Appellees – Nos. 90-1770, 90-1797; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM

In this consolidated appeal[1], plaintiffs appeal the district court's orders dismissing, pursuant to Fed. R. Civ. P. 12 (b)(6) and 56 their civil rights claim brought under 42 U.S.C. § 1983. The actions, removed from state court, arose from the 1986 investigation and administrative fraud proceedings brought against plaintiff transmission repair shops and their owners and shareholders by the Michigan Department of State under the Motor Vehicle Service and

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[1] *American Transmissions, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72470-DT (E.D. Mich. February 9, 1990); and *Pentco Enterprises, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72471-DT (E.D. Mich. February 13, 1990).

Repair Act, Mich. Comp. Laws § 257.1301 *et seq.* Plaintiffs contended that the defendants violated their civil rights under 42 U.S.C. § 1983, by rigging the State's investigation (dubbed "Operation Shifty") through a misleading use of transmissions so that plaintiffs would be found guilty of consumer fraud.

On appeal plaintiffs argue that the district court erred in ruling that: (1) defendants' concerted participation in the "Operation Shifty" investigation was protected under first amendment immunity; (2) plaintiffs' claims were barred by collateral estoppel; and (3) the government defendants Pirochta and Curtis were entitled to qualified immunity.[2] Having carefully considered the record on appeal and the briefs of the parties, we find that the district court did not err as a matter of law.

Because the reasons articulated by the district court in its February 9, 1990, February 13, 1990, and June 26, 1990 opinions adequately resolve the issues raised in this appeal, we affirm the judgments of the district court for the reasons set forth in those opinions.[3]

AFFIRMED.

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[2] The district court granted the defendants' Pirochta and Curtis's motion for summary judgment on grounds of qualified immunity on June 26, 1990. *American Transmissions, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72470-DT (E.D. Mich. June 26, 1990).

[3] The Supreme Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 59 U.S.L.W. 5259 (April 1, 1991), does not alter our conclusion.

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated February 9, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN E. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HONORABLE PATRICK J. DUGGAN)

OPINION

This suit, removed from state court, arises from the investigation and subsequent administrative prosecution of the plaintiff transmission repair shops.[1] The shops were accused of (and, ultimately, convicted of) consumer fraud. Plaintiffs'[2] complaint essentially charges that defendant General Motors Corporation ("GM"), in concert with the

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[1] One such shop, Jay Enterprises, Inc., was criminally prosecuted as well.

The Court also notes that plaintiffs Emilio and Mary Daloisio, Mario Basic, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. Inc. presently deny being the subject of any prior administrative proceedings. The import of this denial is discussed later.

[2] In addition to the various repair shops or entities, the named plaintiffs include the shareholders, *i.e.*, owners, of such shops.

other named defendants, sought to wrongfully eliminate transmission repair facilities thereby limiting GM's obligations under a Federal Trade Commission consent agreement. (Pursuant to such consent agreement, plaintiffs observe, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. Plaintiffs additionally observe that many repair facilities, including those before the Court today, informed customers of their rights under the agreement.) In particular, plaintiffs' complaint alleges:

> 32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities . . . .
>
> * * *
>
> 34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM Building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmissions facilities . . . .

In this vein, plaintiffs further maintain that, though innocent, *in fact*, of any wrongdoing, the aforementioned investigation was fixed or rigged, *i.e.*, designed and conducted to find plaintiffs, among others, guilty of consumer fraud. See paragraph 38 of the complaint which reads:

> Decisions were made by various individuals employed by Defendants, including Lucille

Treganowan, various State of Michigan officials, Michael Hirschman of Fairfax Group Limited and various General Motors Corporation officials to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris,

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

Based on these and the remaining allegations of the complaint, plaintiffs seek damages pursuant to 42 U.S.C. § 1983 and various state law theories.

Now pending before the Court is a motion to dismiss filed jointly by the so-called "non-government" defendants.[3] See Fed.R.Civ.P. 12(b)(6). For the reasons stated below, the motion will be granted.

A 12(b)(6) motion tests the legal sufficiency of a complaint, not the facts that support it. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1356, p. 590 (West 1969). In practice, then,

> [w]hen evaluating a motion to dismiss brought pursuant to rule 12 (b)(6), the factual allegations in

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[3] In addition to GM, the movants (and their respective "role" in the alleged conspiracy) are: Transmissions By Lucille, an out-state transmission shop which furnished transmissions for investigators to use; its owner Lucille Treganowan; and the Fairfax Group, Ltd., which plaintiffs assert, wrote misleading cover stories.

> the complaint must be regarded as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.* 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

Windsor v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). See also *Dugan* v. *Brooks*, 818 F.2d 513, 516 (6th Cir. 1987), *citing Windsor*. Applying this accepted rule, that is, viewed in a light most favorable to plaintiffs and resolving every doubt in their behalf, the Court is nonetheless of the opinion that an actionable § 1983 claim has not been pled. Such claim then, together with the pendent state law claims, *see United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), must be dismissed.

As explained more fully below, the Court, *initially*, is satisfied that plaintiffs' allegations do not invoke any recognized exception to the First Amendment immunity afforded defendants by case law. *Alternatively*, the Court finds that the allegations forming the core of plaintiffs' claim, *i.e.*, that the investigation was improper, were considered and rejected in the underlying administrative proceedings. As a result, the doctrine of collateral estoppel applies, thus precluding this Court's consideration of such allegations.

A. NOERR-PENNINGTON IMMUNITY

In a line of cases beginning with *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), the United States Supreme Court and lower courts have held, as summarized in *Potters Medical Center* v. *City*

Hosp. Assn, 800 F.2d 568 (6th Cir. 1986), "that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability." *Id.* at 578. As explained in *Potters*, immunity is conferred on two grounds: "the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government." *Ibid.*, citing *Noerr, supra* at 137-138. Important for present purposes, the Potters court also observed that "the protection of the *Noerr-Pennington* doctrine [had been extended] to efforts *to influence administrative agencies* and the courts. 800 F.2d at 578, citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Although developed in the context of antitrust liability, defendants correctly note that the scope of the *Noerr-Pennington* doctrine has been enlarged "to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 . . . ." *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied sub nom., City of Dallas v. Video Int'l Prod., Inc.*, __U.S.__, 109 S.Ct. 1955 (1989). See also Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd on other grounds, 477 U.S. 299 (1986). Relying on *Noerr-Pennington* immunity (as subsequently expanded), defendants accordingly urge the Court to dismiss plaintiffs' section 1983 claim.

The immunity defendants raise, however, is *not* absolute; as the *Noerr-Pennington* doctrine has developed, so too have exceptions. The court in *Video Int'l, supra*, traced this latter development and provided the following analysis:

> Possible exceptions to this doctrine were first noted in *Noerr* and *Pennington* and have since developed more fully. Our reading of both the law in

general and the briefs in this case indicates that there is a substantial amount of confusion over the extent of and distinction between these exceptions. We will thus explain our interpretation of these exceptions based upon their purposes.

Much of the confusion surrounding the doctrine and its exceptions arises from the lack of a definition of, and distinction between, two separate exceptions: the "sham" exception and the "co-conspirator" exception. These two separate ideas are often confusingly interchanged in the case law . . . . Nonetheless we discern these two ideas as separate and deriving from slightly different policy objectives.

The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the "sham" exception. . . .

* * *

. . . We agree that although sometimes a sham petition may coincide in a case with an illegal conspiracy with government officials, it need not always do so, and it is the illegal conspiracy that is the essence of this second exception to the *Noerr-Pennington* doctrine. We must thus examine whether

> such an illegal conspiracy existed between WAX and City officials sufficient to activate the co-conspirator exception.
>
> Our reading of the cases involving the "co-conspirator" exception demonstrate that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some corrupt means. *See, e.g., Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984). Although WAX argues that the exception will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

858 F.2d at 1082-1083. Opposing defendants' motion, plaintiffs rely on the "sham" and "co-conspirator" exceptions. The Court finds such reliance misplaced.

Regarding the "co-conspirator" exception, the Court notes that several circuits have questioned its validity. *See First Am. Title Co. of S. Dakota v. S. Dakota Land Title Ass'n*, 714 F.2d 1439, 1446 n. 6 (8th Cir. 1983) (listing cases), *cert. denied*, 464 U.S. 1042 (1984). The following passage is illustrative of the criticism voiced:

> In the case at bar, the allegations on the basis of which the defendant mayor and alderman are said to have been co-conspirators are that they were persuaded by two members of the public, who are also defendants, to support the CATV application and to oppose plaintiff's application, and that they were

given campaign contributions "in exchange" for this undertaking. These allegations do not take the case outside the protection of the *Noerr* doctrine. Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a "conspiracy," and that if some of the "conspirators" persuade a member of the legislative body to agree to support their cause, he becomes a "co-conspirator" and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became such "co-conspirators." A holding that participation by members of the legislative body to the extent alleged here rendered the *Noerr* doctrine inapplicable to a campaign to induce legislative action, would, like a holding "that the knowing infliction of . . . injury renders the campaign itself illegal . . . [,] be tantamount to outlawing all such campaigns." Cf. *Noerr*, 365 U.S. at 143-144, 81 S.Ct. at 533.

Moreover, we can find no rational basis in the authorities or plaintiff's argument for holding that such participation by a member of the legislative body as is here alleged should cause the Sherman Act to apply to an effort to induce governmental action that is otherwise protected by *Noerr*. Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 230 (7th Cir. 1975).

This Court, too believes that unless meaningfully limited, the "co-conspirator" exception would swallow the general *Noerr-Pennington* rule. Accordingly, the Court thereby accepts and adopts, in the absence of Sixth Circuit precedent, the requirement alluded to in *Video Int'l, supra:* "the official with whom the [defendant] conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the [defendant] to result in an illegal conspiracy sufficient to activate the co-conspirator exception." 858 F.2d at 1083. A review of plaintiffs' complaint discloses no allegation satisfying the "selfish or otherwise corrupt motive" requirement.

Turning to the "sham" exception, described earlier, the Court similarly finds plaintiffs' allegations inadequate. Simply put, in light of the administrative action taken against plaintiffs, *i.e.*, the license revocations, which the complaint acknowledges, it cannot be said that defendants' conduct was of the "'baseless' sort . . . to which the sham exception applies . . . ." *Potters*, 800 F.2d at 579 (citations omitted).[4]

Finally, and apart from the "co-conspirator" and "sham" exceptions, plaintiffs argue, *without* citation, that the degree of assistance provided by defendants to the state investigators went beyond constitutionally protected "petitioning" of the government. The Court disagrees, believing defendants' conduct to be comparable to the immunized assistance given to law enforcement authorities in *Ottens-*

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[4] In this Court's opinion, plaintiffs' charge of investigative impropriety was rejected, largely, as *factually* unfounded. (See exhibit C of defendants' appendix, pp. 167-176.) Because, under Michigan law, "[g]reat deference is given to the findings of an administrative hearing or other administrative officer sitting as the trier of fact[,]" *Kelly v. Liquor Control Comm'n*, 131 Mich. App. 600, 602 (1983) (citation omitted), the pendency of a civil action for judicial review of the administrative proceedings in Wayne County Circuit Court (alluded to, but not documented by, plaintiffs) does not alter this Court's conclusion that the "sham" exception is unavailing.

meyer v. *Chesapeake & Potomac Tel. Co. of Maryland*, 756 F.2d 986 (4th Cir. 1985) and *Forro Precision, Inc.* v. *Int'l Business Mach.*, 673 F.2d 1045 (9th Cir. 1982).

In sum, the Court holds that plaintiffs' allegations do not strip defendants of the immunity (which they have affirmatively raised) afforded them by applicable case law.

B. COLLATERAL ESTOPPEL

Defendants also raise, as a second basis for dismissal, the doctrine of collateral estoppel. The Court agrees with defendants that the state administrative factfinding must be given preclusive effect. As instructed in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986),

> when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate," *Utah Construction & Mining Co.*, *supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

478 U.S. at 799 (footnote omitted). *See also Pilarowski* v. *Macomb County Health Dep't*, 841 F.2d 1281 (6th Cir.), cert. denied, __U.S.__, 109 S.Ct. 133 (1988).

Here, plaintiffs essentially defended the charges brought in the underlying administrative proceedings by attacking the integrity of the State's investigation. In short, such attack was rejected; specifically rejected were contentions that GM's assistance was improper, and that the transmissions used in the undercover investigation were unreliable or inadequate. These contentions presently form the *core* of plaintiffs' section 1983 claim. To allow plaintiffs the opportunity to *relitigate them before this Court* is simply impermissible. The concerns identified in *Elliott*, *supra*, namely, the erosion of federalism, the risk of inconsistent results, *etc.*, apply with equal force here. Plaintiffs' argument to the

contrary is, as construed by this Court, two-fold. *First*, plaintiffs maintain that in the underlying administrative action, it was never resolved whether defendants had deprived them (plaintiffs) of liberty and/or property without due process of law in violation of the Fourteenth Amendment's guarantee. While true, such contention nevertheless does *not* counsel against this Court's conclusion that the underlying administrative proceedings must be afforded preclusive effect. Again, as stated above, the allegations forming plaintiffs' section 1983 claim have been resolved (adversely, the Court adds, to plaintiffs). That plaintiffs did not attach a section 1983 label to their allegations below is plainly inconsequential.

Second, plaintiffs contend that Michigan law (which, *Elliott*, *supra* teaches, provides the rule of decision), with its continuing adherence to the so-called "mutuality" requirement, denies preclusive effect to the administrative proceedings below as to the defendant movants today (*i.e.*, the "non-government" defendants). Mutuality, used in this context, simply means that "both the litigants must be alike concluded by the [prior] judgment or it binds neither." *Howell* v. *Vito's Trucking Co.*, 386 Mich. 37, 45 (1971) (footnote and internal quotations omitted). Here, plaintiffs observe, defendants were not parties to the underlying administrative proceedings. Except as noted below, the Court finds this second contention equally unpersuasive.[5]

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[5] As noted earlier, plaintiffs Bossio, the Daloisio's, B & C Corp. Inc., Trans-4, Inc., and M & E Corp., Inc., deny being the subject of any prior administrative proceedings, and by implication, then, deny losing their respective licenses. Accepting such denial, defendants thus argue that these plaintiffs have not suffered any injury to a constitutionally-protected (specifically, a Due Process Clause-protected) interest. The Court disagrees. Mindful of the prevailing 12(b)(6) standard, the Court believes these plaintiffs have suffered an injury of the kind alluded to in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1973), the holding in which the court left undisturbed in *Paul* v. *Davis*, 424 U.S. 693 (1976), defendants primary citation. Consequently, the "collateral estoppel" grounds for dismissal discussed in this opinion, does not apply to these plaintiffs.

Assuming, without deciding, that *Howell* is good law (see, however, *Knoblauch* v. *Kenyon*, 163 Mich. App. 712 (1987))[6], the Court is nonetheless of the view that the requirement of mutuality ought to be excused in this case. In *Knoblauch*, *supra*, the court held that, as to issues determined in a criminal prosecution, collateral estoppel may be defensively asserted, *i.e.*, invoked by a defendant in a subsequent civil action. Here, too, defendants in this, a subsequent civil action, assert collateral estoppel and, accordingly, this Court finds *Knoblauch* instructive. Because the reasoning advanced in *Knoblauch* is no less persuasive where, as here, the underlying administrative proceedings are akin to criminal prosecutions (and, indeed, can be fairly characterized as quasi-criminal), the Court, on the strength of *Knoblauch*, will collaterally estop plaintiffs from litigating the section 1983 claim brought. (The holding in

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[6] In *Knoblauch*, the court made the following pointed observations:

> In these days of congested dockets, we find too little satisfaction in strict adherence to the mutuality requirement, where, as here, the issue presented has been decided and appealed and the plaintiff has had a full and fair opportunity to litigate the question in his prior case. This collective dissatisfaction is compounded by the fact that the legal underpinnings of *Howell* have been largely eroded in the last decade. The mutuality requirement set forth in the Restatement (First) and cited in *Howell* has been dropped in Restatement Judgments (Second), §§ 27-29, pp 119-123. 1B Moore, Federal Practice, also relied upon by the *Howell* Court, now states that the states adhering to the mutuality requirement "constitute a small minority." Paragraph 0.441[3.-2], p 735. At least two of the states cited in *Howell* for their adherence to the rule have abrogated it in certain situations. See *Oates* v. *Safeco Ins. Co. of America*, 583 SW2d 713 (Mo, 1979), and *Continental Can Co.* v. *Hudson Foam Latex Products, Inc.*, 129 NJ Super 426; 324 A2d 60 (1974). Under *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 US 313; 91 S.Ct. 1434; 28 L Ed 2d 788 (1971), and *Parklane Hosiery Co., Inc* v. *Shore*, 439 US 322; 99 S.Ct. 645; 58 L Ed 2d 552 (1979), one not a party or a privy may now use collateral estoppel both defensively and offensively in federal courts applying federal law.

163 Mich. App. at 721.

Knoblauch clearly applies to dispose of, on collateral estoppel grounds, plaintiff Jay Enterprises, Inc.'s section 1983 claim. Such plaintiff, as previously noted, had been criminally (in addition to administratively) prosecuted and convicted in Recorder's Court.)

In sum, then, this Court, faithful to *Elliott*, *supra*, "must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799 (footnote omitted). As construed by this Court, Michigan law would afford preclusive effect to the administrative proceedings below. In addition to *Knoblauch*, *supra*, see also *Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 399 Mich. 449 (1976). Accordingly, plaintiffs' section 1983 claim is subject to dismissal on alternate grounds, *i.e.*, on grounds other than the *Noerr-Pennington* doctrine discussed above. The factual issues determined below and necessary to plaintiffs' section 1983 claim may not now be relitigated.

C. PENDENT STATE CLAIMS

Having dismissed the section 1983 claim, the Court hereby dismisses plaintiffs' pendent state claims pursuant to *Gibbs*, *supra*. *See also Province v. Cleveland Press Publishing Co.*, 787 F.2d 1049, 1055 (6th Cir. 1986) ("[t]hrough a series of cases following *United Mine Workers* [v. *Gibbs*], this circuit has adopted the position that the district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial") (citation omitted).

For the reasons stated,[7] it is this Court's opinion that defendants GM, Transmissions By Lucille, Lucille Treganowan and the Fairfax Group, Ltd.'s motion to dismiss must be GRANTED.

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[7] The Court does not reach defendants' argument that the elements of a section 1983 claim, articulated in *Parrat v. Taylor*, 451 U.S. 527, 535 (1981), have not been alleged.

An order consistent with this opinion shall issue.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: February 9, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Thomas A. Gottschalk, Esq..

ORDER

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on February 9, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

This matter is before the Court on defendants General Motors Corporation, the Fairfax Group, Ltd., Transmissions by Lucille and Lucille Treganowan's motion to dismiss brought pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth in an opinion issued this date,

IT IS ORDERED that such motion is GRANTED.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: February 9, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Thomas A. Gottschalk, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed April 27, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN E FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on April 27, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

This is, in part, a section 1983 action removed from the Wayne County Circuit Court. Plaintiffs charge that defendant General Motors Corporation ("GM"), in concert with the other named defendants, wrongfully sought to, and ultimately did, eliminate the transmission repair facilities owned by or affiliated with the plaintiffs thereby limiting GM's obligations under a Federal Trade Commission consent agreement.[1] Specifically, it is *alleged* that the defen-

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[1] Pursuant to such consent agreement, plaintiff's complaint observes, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. The complaint additionally observes that many repair facilities, including those named as plaintiffs in this lawsuit, informed customers of their rights under the agreement.

dants, at GM's initiative, fixed or rigged an investigation to find plaintiffs guilty of consumer fraud though they were innocent, *in fact*, of any wrongdoing. Such investigation led to the administrative prosecution of the plaintiff repair shops by State of Michigan authorities.

In an opinion dated February 9, 1990 (a separate order was entered that same day), this Court held that plaintiffs had not stated an actionable section 1983 claim against the so-called "non-governmental defendants, *i.e.*, defendants G.M., Transmissions by Lucille, Lucille Treganowan, and Fairfax Group, Ltd. (Only *these* defendants had moved to dismiss.) *See, generally*, Fed.R.Civ.P. 12(b)(6). The Court's reasoning was two-fold. *Initially*, the Court was satisfied that plaintiffs' allegations did not invoke any recognized exception to the First Amendment immunity afforded defendants by case law. *Alternatively*, the Court found that the allegations forming the *core* of plaintiffs' section 1983, *i.e.*, that the investigation was improperly rigged or fixed, were considered and rejected in the underlying administrative proceedings. Accordingly, the Court determined that the doctrine of collateral estoppel applied, thus precluding further judicial review of such allegations. Having dismissed the section 1983 claim, the pendent state law claims against the non-governmental defendants were dismissed as well.

Presently, plaintiffs move the Court to reconsider its opinion of February 9, 1990. For the reasons stated below, such request is granted, in part, and denied, in part.

A. SECTION 1983 CLAIM

Under Local Rule 17(m)(3),

> motions for rehearing or reconsideration which merely present the same issues ruled upon the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only

> demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Here, plaintiffs do not raise any issues not considered by the court in its prior ruling dismissing their section 1983 claim.[2] Relatedly, plaintiffs have not demonstrated a "palpable defect" within the meaning of Rule 17(m)(3), nor have they convinced the Court that a "different disposition of the case must result . . . ." What was said, then, in *Durkin v. Taylor*, 444 F. Supp. 879 (E.D. Va. 1977) is particularly instructive:

> Whatever may be the purpose of [Fed.R.Civ.P. 59, pursuant to which motions for reconsideration are treated, *see Sidney Vinstein v. A.H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983),] it should not be supposed that is intended to give an unhappy litigant one additional chance to sway the judge.
>
> Since the plaintiff has brought up nothing new – except his displeasure – this Court has no proper basis upon which to alter or amend the order previously entered.

444 F. Supp. at 889.

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[2] Though the decision was previously considered, the Court sees fit to briefly address *Huron Valley Hosp., Inc. v. City of Pontiac*, 650 F.Supp. 1325 (E.D. Mich. 1986), *aff'd*, 849 F.2d 262 (6th Cir. 1988), upon which plaintiffs place renewed reliance. Their reliance is misplaced. There, the district court judge held that the evidence did not support the claimed conspiracy. He did not consider, and, thus, did not reject, the limitations to the co-conspirator exception to First Amendment immunity this Court imposed. Simply stated, he had no occasion to. Consequently, neither his opinion nor the Sixth Circuit's opinion is inconsistent with this Court's ruling.

Regarding the Court's collateral estoppel holding, plaintiffs make much of the Court's departure from (or relaxation of) the mutuality requirement. The Court remains convinced that *Knoblauch v. Kenyon*, 163 Mich.App. 712 (1987), authorizes such departure.

In short, plaintiffs have not satisfied the standard incorporated in Local Rule 17(m)(3). Thus, as was the case in *Durkin, supra*, the Court is without a proper basis to grant plaintiffs' request for reconsideration of the decision dismissing their section 1983 claim.[3]

B. PENDENT STATE LAW CLAIMS

As alluded to earlier, the Court also dismissed plaintiff's pendent state law claims filed against the non-governmental defendants. The Court, upon further reflection, agrees with plaintiffs that the better course is to *remand* these pendent claims to state court (as opposed to *dismissing* them). See Carnegie-Mellon Univ. v. Cohill, __U.S.__ , 107 S.Ct. 1283 (1988).[4]

Accordingly, for the reasons stated above,

IT IS ORDERED that plaintiff's Motion for Reconsideration is GRANTED, IN PART, and DENIED, IN PART.

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[3] Regarding the section 1983 claim, plaintiffs alternatively ask the Court for the opportunity "to amend their Complaint to . . . add additional averment which would embellish upon the frailties suggested by the Court's Opinion [of February 9, 1990]." Brief in support, at p. 14 (citation omitted). Plaintiffs however, have not presented a proposed amended complaint. Other than their conclusory, self-serving suggestion that the amended complaint will "embellish upon the frailties" of the original complaint, the Court is thus without the information needed to evaluate this alternative request. Accordingly, such alternative request to amend is DENIED.

[4] The Court notes that with the dismissal of the section 1983 claim against the non-governmental defendants, it is the decision in *Aldinger v. Howard*, 427 U.S. 1 (1976), not previously cited by this Court which precludes this Court's consideration of the state law claims against these same defendants. Simply put, such dismissal makes the non-governmental defendants pendent "parties" as that term is explained and used in *Aldinger*. As further explained in *Aldinger* (where the Supreme Court refined the analysis in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the decision this Court previously cited), section 1983 does not confer subject matter jurisdiction over pendent parties. Thus, though a section 1983 claim is pending against the state or governmental defendants, this court nonetheless cannot entertain the state law claims against the non-governmental defendants.

IT IS FURTHER ORDERED that the Court's order of February 9, 1990 is amended to read as follows:

> IT IS ORDERED that such motion is GRANTED as to plaintiffs' section 1983 claim.
>
> IT IS FURTHER ORDERED that plaintiff's pendant state claims against the non-governmental defendants are REMANDED to the Wayne County Circuit Court.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: April 27, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Brian D. Devlin, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 11, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on June 11, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

In this matter, the so-called "non-government" defendants (*i.e.*, defendants General Motors Corporation, Transmissions by Lucille, Lucille Treganowan and the Fairfax Group, Ltd.) request the Court to reconsider its decision remanding the state law claims filed against them to Wayne County Circuit Court. Because the Court has *not*, to date, considered the views of these defendants regarding the remand of such claims,[1] their motion for reconsideration is

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[1] Remand of the claims was ordered pursuant to *plaintiffs'* earlier-filed motion for reconsideration to which the defendants did not respond and, indeed, under local rules, could not respond: *See* Local Rule 17(m)(2).

granted. On the merits, however, the motion is denied for the following reasons.

Essentially, the non-government defendants (hereinafter the "defendants") urge the Court to apply the reasoning adopted by the Court in its opinion and accompanying order of February 9, 1990, wherein plaintiffs' lone federal (*i.e.*, section 1983) claim was dismissed, in part, on *Noerr-Pennington* immunity grounds, to the state law claims. Rather than *remanding* the state law claims (and, in defendants' words, "perpetuating" this action), the defendants ask the Court to *dismiss* such claims pursuant to Fed.R.Civ.P. 12(b)(6). Upon further reflection, the Court adheres to its view, previously expressed, that the better course is to remand the state law claims.

In asking that the Court dismiss plaintiffs' state law claims pursuant to Rule 12(b)(6), the defendants also ask that the Court retain *jurisdiction* over these claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), however, instructs: "Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Id.* at 726 (footnote omitted).[2] And in *Province* v. *Cleveland Press Pub. Co.*, 787 F.2d 1047 (1987), the Sixth Circuit wrote:

> Through a series of cases following [*Gibbs*], this circuit has adopted the position that the district courts have *minimal* discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial. *See Service, Hospital, Nursing Home and Public Employees Union* v. *Commercial Properties Services*, 755 F.2d

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[2] Because the plaintiff in *Gibbs* brought suit in federal court, remand "was not an option in [that] case." *Carnegie-Mellon Univ.* v. *Cohill*, __U.S.__, 108 S.Ct. 614, 619 (1988). This fact explains why the *Gibbs* Court spoke of dismissal, not remand. *Ibid.* In this instant matter, remand is, as *Carnegie-Mellon* teaches, a viable option.

> 499, 506 n.9 (6th Cir. 1985) ("this circuit has moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed before trial.").

Id. at 1055 (emphasis added). The instant case presents no occasion to exercise such minimal discretion.

Simply put, while economy may be realized if the Court were to resolve the state law claims (primarily because there is similarity between the factual allegations predicating both the federal and state claims), it *cannot* be said that the interest in judicial economy is "overwhelming". *Ibid.* Unlike the situation confronting the court in *Province*, discovery has not yet closed nor has a "substantial amount of time and resources . . . been expanded." *Ibid.*

Accordingly, for the reasons stated above and consistent with its previous decision, the Court remands plaintiffs' state law claims against the non-governmental defendants to Wayne County Circuit Court for further proceedings.

IT IS ORDERED.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 11, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Bruce D. Devlin, Esq. Thomas A. Gottschalk, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 26, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

OPINION

This suit, removed from state court, arises from the investigation and subsequent administrative prosecution of the plaintiff transmission repair shops.[1] The shops were accused of (and, ultimately, convicted of) consumer fraud. Plaintiffs' complaint essentially charges that defendant General Motor Corporation ("GM"), in concert with the other named defendants, sought to wrongfully eliminate transmission repair facilities thereby limiting GM's obliga-

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[1] One such shop, Jay Enterprises, Inc., was criminally prosecuted as well.

The Court also notes that plaintiffs Emilio and Mary Daloisio, Mario Basio, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. Inc. wee not the subjects of any prior administrative proceedings. The import of this fact is discussed later.

tions under a Federal Trade Commission consent agreement. (Pursuant to such consent agreement, plaintiffs observe, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. Plaintiffs additionally observe that many repair facilities, including those before the Court today, informed customers of their rights under the agreement.) In particular, plaintiffs' complaint alleges:

> 32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities . . . .
>
> * * *
>
> 34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM Building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmissions facilities . . . .

In this vein, plaintiffs further maintain that, though innocent, *in fact*, of any wrongdoing, the aforementioned investigation was fixed or rigged, *i.e.*, designed and conducted to find plaintiffs, among others, guilty of consumer fraud. See paragraph 38 of the complaint which reads:

> Decisions were made by various individuals employed by Defendants, including . . . various State of Michigan officials, . . . to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris,

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

Finally, at paragraph 48, plaintiffs allege that "a massive display of publicity . . . [was] generated by the officials of the State of Michigan . . . intentionally directing the public to avoid use of chain_transmission facilities . . . ." Based on these and other allegations, plaintiffs seek damages pursuant to 42 U.S.C. § 1983 (complaining of a due process violation) and various state law theories.

Defendants Pirochta and Curtis, two of the state officials referred to above, presently move for summary judgment. For the reasons provided below, the Court concludes that these defendants are entitled to summary judgment on plaintiffs' section 1983 claim.

The doctrine of qualified immunity provides the basis for this conclusion. Such doctrine was discussed in *Anderson v. Creighton*, ___U.S.___ , 107 S.Ct. 3034 (1987). There, the Court began by reaffirming the standard announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1981):

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action[,]

> *Harlow*, 457 U.S., at 819, 102 S.Ct., 2739, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.*, at 818, 102 S.Ct., at 2738.

107 S.Ct. at 3038. In a passage particularly pertinent to the due process claims confronting this Court, the Supreme Court elaborated:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violated that clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the

> very action in question has previously been held unlawful, see *Mitchell*, 472 U.S., at 535, n.12, 105 S.Ct., at 2820, n.12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. . . .

107 S.Ct. at 3038-3039 (citations omitted). *See also Danese v. Asman*, 875 F.2d 1239, 1242 (6th Cir. 1989).

Thus, in determining whether or not these defendants are entitled to the defense of qualified immunity, this Court must address the "fact-specific" question of whether a reasonable person could have believed that the conduct plaintiff now complains of was lawful, taking into consideration all of the information the defendants possessed and the preexisting judicial interpretation of the Due Process Clause. *Anderson*, 107 S.Ct. at 3040. Answering this question,[2] the Court finds defendants' actions objectively reasonable. In this Court's opinion, then, qualified immunity thus attaches, and defendants are entitled to summary judgment on plaintiffs' section 1983 claim.

As alluded to earlier, plaintiffs, in part, attack the integrity of the State's investigation. Specifically, they charge that the condition of the transmissions used in the undercover investigation was fixed, or, to use the terms of M.C.L.A. 257.1326(d), "deliberately misrepresented", in violation of such statute. This charge, however, is *factually unfounded*. In the state administrative proceedings, the decisionmaker rejected plaintiffs' allegation (raised again here) that the condition of the transmissions was deliberately misrepresented. And this finding by the state decisionmaker must be given preclusive effect. See *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), where the Supreme Court instructed:

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[2] This is a legal question to be decided by the Court. *See Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate," *Utah Construction & Mining Co., supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Id. at 799 (footnote omitted). *See also Pilarowski v. Macomb County Health Dep't*, 841 F.2d 1281 (6th Cir.), *cert. denied*, ___U.S.___, 109 S.Ct. 133 (1988). Michigan law, as construed by this Court, would afford preclusive effect. *See Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 399 Mich.App. 449 (1976). *Cf. Knoblauch v. Kenyon*, 163 Mich.App. 712 (1987). Because the allegations as to the investigation's purported improprieties are unfounded, it cannot be said that defendants Pirochta and Curtis acted unreasonably (or, indeed unlawfully). Regarding the investigation, then, they enjoy qualified immunity.[3]

As further alluded to earlier, plaintiffs Emilio and Mary Dalosio, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. were not subjected to any administrative proceedings. Consequently, their complaint is not directed against the investigation or subsequent proceedings; rather, they complain

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[3] In an opinion dated February 9, 1990, the Court dismissed plaintiffs' section 1983 claim against the so-called "non-governmental" defendants named in this action (*i.e.*, G.M., Transmissions by Lucille, Lucille Treganowan and the Fairfax Group, Ltd.) reasoning, in part, that these non-governmental defendants enjoyed *Noerr-Pennington* immunity. Such immunity, derived from the First Amendment, permits private parties to petition the government to induce governmental action. The Court's holding today that defendants Pirochta and Curtis are immune from damages on that portion of plaintiffs' section 1983 claim attacking the integrity of the investigation is consistent with its earlier holding. To immunize the act of petitioning the government, but not the government's response thereto, strikes this Court as anomalous particularly where, as here, the "sham" and "co-conspirator" exceptions to the *Noerr-Pennington* doctrine were held to be inapplicable.

of the "publicity" generated by defendants Pirochta and Curtis (in concert with others). Such publicity, these plaintiffs maintain, maligned an *entire* industry — *i.e.*, the transmission repair industry — though, in fact, only a *few* shops were found to have committed consumer fraud. As a result, with their business reputations so maligned, they allegedly suffered substantial economic losses. Assuming that the publicity deprived these plaintiffs of a protected liberty or property interest without due process of law, contrary to the command of the 14th Amendment, *see Wisconsin* v. *Constantineau*, 400 U.S. 433 (1973), the Court nonetheless finds, as a matter of law, that "any official could have . . . reasonably believed that his action was lawful." *Danese*, *supra*, at 1242.

Simply put, though the publicity may have "significantly altered [the plaintiffs'] status as a matter of state law", *see Paul* v. *Davis*, 424 U.S. 693, 704 (1976) (clarifying the underpinnings of *Constantineau*, *supra*), by adversely affecting their business which the State of Michigan licensed and regulated, there has been no showing by plaintiffs in response to defendants' motion that the statements made to the public singled out these particular plaintiffs. *See* Fed.R.Civ.P. 36(e) ("[w]hen a motion for summary judgment is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading"), cited in *Celotex Corp.* v. *Cattrett*, 477 U.S. 317 (1986). Accordingly, absent such identification, this Court is not prepared to hold (as would plaintiffs) that the public release of investigative findings regarding consumer fraud perpetrated by franchised transmission shops violates a clearly established right of which defendants Pirochta and Curtis should have known. Compare *Constantineau*, where the information disseminated identified the plaintiff by name. This Court cannot say that the unlawfulness of the "publicity" was apparent. Faithful to *Anderson*, *supra*, the Court is thus of the view

that the doctrine of qualified immunity extends to plaintiffs' publicity allegations (as distinct from the "rigged" investigation allegations) as well. That portion of plaintiffs' section 1983 claim predicated on such publicity allegations, then, are likewise subject to summary judgment.

Having dismissed the section 1983 claim, the Court will remand plaintiffs' state law claims against defendants Pirochta and Curtis. *See Carnegie-Mellon Univ. v. Cohill*, ___U.S.___ , 108 S.Ct. 614 (1988). In so doing, the Court declines defendants' invitation to retain jurisdiction over (and ultimately decide) such claims. See *Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047 (6th Cir. 1987) where the court wrote: "Through a series of cases following [*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)], this circuit has adopted the position that the district courts have *minimal* discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." 787 F.2d at 1035 (emphasis added; citation omitted). The instant case — where discovery has not yet closed, where "substantial . . . time and resources" have not been expended, *ibid.*, and where state claims against the non-governmental defendants have already been remanded — presents no occasion to exercise the minimal discretion given this Court.

To conclude, the Court is of the view that defendants Pirochta and Curtis enjoy qualified immunity from damages. Regarding plaintiff's section 1983 claim, then, these defendants will be granted summary judgment. The state law claims against them will be remanded to the Wayne County Circuit Court. This disposition, the Court notes,

makes the motion for stay of discovery, filed by Pirochta and Curtis and also pending before this Court, moot.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 26, 1990

Copies mailed to:
Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee Schutzman, Esq., Thomas Gottschalk, Esq..

ORDER GRANTING DEFENDANTS SUMMARY JUDGMENT AS TO THE 42 U.S.C. § 1983 CLAIM AND REMANDING STATE LAW CLAIMS TO WAYNE COUNTY CIRCUIT COURT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on June 26, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT

For the reasons set forth in the Court's opinion issued this same date,

IT IS ORDERED that defendants Pirochta and Curtis' Motion for Summary Judgment as to plaintiffs' 42 U.S.C. § 1983 claim is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' state law claims against these defendants are REMANDED to Wayne County Circuit Court.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 26, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:
Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee Schutzman, Esq., Thomas Gottschalk, Esq..

COMPLAINT AND JURY DEMAND

(State of Michigan – Circuit Court – County of Wayne)

(Dated July 18, 1989)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, a Delaware corporation, the STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, a Pennsylvania corporation, and FAIRFAX GROUP LIMITED, a Virginia corporation, Jointly and Severally, Defendants – 89-917691 NZ; JDG.: HELENE N. WHITE)

There is now on file in this Court the following actions between some of these parties arising out of the same or similar transactions or occurrences as alleged in this Complaint:

> Administrative Appeal No. 89-910378AA, Appellants American Transmissions of Plymouth and of Garden City and of Ann Arbor, Meixner and Zarbaugh v. Appellees Michigan Department of State, Office of Secretary of State, and Bureau of Automotive Regulation
>
> and
>
> Consumer Protection Action No. 86-622774CP, 86-622775CP, 86-622825CP (consolidated) Frank J. Kelley v. Jay Enterprises, Commercial Transmissions, Inc., J, J & T, Inc.

These actions are pending and have been assigned to Judge Helene N. White.

/s/ Martin E. Crandall
/s/ Janice A. Kyko
/s/ Mark R. Bendure
/s/ James J. Williams

Plaintiffs American Transmissions, Inc., American Transmissions Land Company, Inc., Jay Enterprises, Inc., J, J & T, Inc., Commercial Transmissions, Inc., John F. Folino, Joyce Folino, John A. Folino, Thomas A. Folino, Mario Bossio, B & C Corp., Inc., Trans-4, Inc., Emilio Daloisio, Mary Daloisio and M & E Corp., by and through their attorneys, Martin E. Crandall, Janice A. Kyko, Mark R. Bendure and James J. Williams, for their Complaint state as follows:

PARTIES, VENUE AND JURISDICTION

1. Plaintiff American Transmissions, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

2. Plaintiff American Transmissions Land Company, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

3. Plaintiff Jay Enterprises, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

4. Plaintiff J, J & T, Inc. is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

5. Plaintiff Commercial Transmissions, Inc. is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

6. Plaintiff B & C Corp., Inc. is a Michigan corporation, having its principal place of business in the City of Royal Oak, Oakland County, Michigan.

7. Plaintiff Trans-4, Inc. is a Michigan corporation, having its principal place of business in the City of Farmington Hills, Oakland County, Michigan.

8. Plaintiff M & E Corporation is a Michigan corporation, having its principal place of business in the City of Dearborn Heights, Wayne County, Michigan.

9. Plaintiff John F. Folino resides in Wayne County, Michigan and is an officer and shareholder of Plaintiffs American Transmissions, Inc., American Transmissions Land Company, Inc., Jay Enterprises, Inc., J, J & T, Inc. and Commercial Transmissions, Inc.

10. Plaintiff Joyce Folino resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff Jay Enterprises.

11. Plaintiff John A. Folino resides in Oakland County, Michigan and is an officer and shareholder of Plaintiff J, J & T, Inc.

12. Plaintiff Thomas A. Folino resides in Oakland County, Michigan and is an officer and shareholder of Plaintiff J, J & T, Inc.

13. Plaintiff Mario Bossio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiffs B & C Corporation and Trans-4, Inc.

14. Plaintiff Emilio Daloisio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff M & E Corporation.

15. Plaintiff Mary Daloisio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff M & E Corporation.

PRIVATE DEFENDANTS

16. Defendant General Motors Corporation is a Delaware corporation, having a registered office and place

of business and conducts business in Wayne County, Michigan, with its office and principal place of business located at 3044 West Grand Boulevard in the City of Detroit, State of Michigan.

17. Defendant Fairfax Group Limited is a Virginia corporation, having a registered office at 5218 Ashcroft County, Fairfax, Virginia.

18. Defendant Transmissions by Lucille, Inc. is a Pennsylvania corporation with its corporate office at 49 Verona Road, Pittsburgh, Pennsylvania.

19. Defendant Lucille Treganowan resides in Pennsylvania and is an officer and owner of Defendant Transmissions by Lucille, Inc.

PUBLIC DEFENDANTS

20. Defendant State of Michigan, through its Bureau of Automotive Regulation and its Attorney General, during the times relevant to this Complaint, worked with, for and on behalf of General Motors Corporation.

21. Defendant Frederick Pirochta was at all times relevant the Director of Michigan's Bureau of Automotive Regulations.

22. Defendant Walter Curtis was a mechanic at all relevant times employed by Michigan's Bureau of Automotive Regulations.

23. The within causes of action arose out of the Defendants doing or causing acts to be done in Wayne County and other locations.

24. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($ 10,000.00) Dollars.

25. In approximately 1975, Defendant General Motors began manufacturing a defective transmission known as the

Turbohydromatic (THM) 200, which they installed in approximately 5 million vehicles.

GENERAL ALLEGATIONS

26. On or about November 15, 1982, the Federal Trade Commission and Defendant General Motors Corporation (hereinafter General Motors) entered into a Consent Order requiring General Motors to implement a nationwide third-party arbitration program to settle consumer complaints relating to, *inter alia*, General Motors transmissions.

27. The Better Business Bureau (hereinafter BBB) was used, pursuant to the Consent Order, to arbitrate the costs to be allocated between General Motors and consumers for defective transmissions which had to be repaired after November 15, 1982.

28. Resulting from the FTC Consent Order and the BBB arbitrations, was a substantial amount of bad publicity concerning General Motors' Turbohydromatic (THM) 200 transmissions which General Motors sought to avoid.

29. Between 1982 and 1985, Defendant General Motors had to pay approximately $40 million for the repairs of transmissions, pursuant to the FTC/BBB arbitration program.

30. Intentionally to circumvent the bad publicity and avoid BBB arbitrations, and intentionally to avoid their warranty requirements, Defendant General Motors decided to initiate a program to disparage chain transmission facilities, including the corporate Plaintiffs, which were repairing the faulty THM 200 General Motors transmissions and notifying consumers of their rights under the FTC Consent Order.

31. In approximately late 1985, Defendant General Motors agreed with Lucille Treganowan and Transmissions by Lucille, Inc. to attack various chain transmission facili-

ties which were performing the repairs on the aforementioned General Motors transmissions.

32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities in order for Defendant General Motors to avoid its aforementioned warranty obligations.

33. Defendant Fairfax Group, Ltd. was utilized with Lucille Treganowan and Transmissions by Lucille, Inc., to attack the chain transmission facilities.

34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmission facilities, including Plaintiffs named in this Complaint.

35. In or about April 1986, a meeting was held at the General Motors Tech Center in Warren, Michigan and present at said meeting was Fred Pirochta, the State's Bureau of Automotive Regulation Director, Janice B. Levine, Assistant Attorney General, various General Motors personnel and others, for the purpose of coordinating the attack upon Plaintiffs.

36. In approximately April of 1986, Walter Curtis, a mechanic employed by the State of Michigan's Bureau of Automotive Regulation, was trained by Defendant Lucille Treganowan at her place of business in Pittsburgh, Pennsylvania, Transmissions by Lucille, Inc.

37. In approximately April of 1986, Defendant General Motors Corporation and Defendant Fairfax developed var-

ious coercive cover stories to be utilized by Defendant State of Michigan investigators conducting the attack upon the chain transmission facilities, including Plaintiffs' facilities.

38. Decisions were made by various individuals employed by Defendants, including Lucille Treganowan, various State of Michigan officials, Michael Hirschman of Fairfax Group Limited and various General Motors Corporation officials to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris;

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

39. Between June 11 and June 13, 1986, Walter Curtis and various employees of Lucille Treganowan's at her place of business in Pittsburgh, Pennsylvania, prepared numerous transmissions for use in the investigation.

40. Between June 11 and June 13, 1986, Lucille Treganowan and her business provided to the State of Michigan quantities of used transmission fluid, various dirty pans and quantities of graphite for use in the investigation.

41. On or about June 18, 1986, Lucille Treganowan, Janice B. Levine, Fred Pirochta, various General Motors personnel and others, had a meeting in Florida to discuss the investigation.

42. In June of 1986, employees of Transmissions by Lucille, Inc., performed labor and supplied transmissions and parts for various transmissions to be utilized in the State of Michigan/General Motors investigation.

43. Defendant Lucille Treganowan invoiced Defendant General Motors Corporation for the labor, parts and transmissions utilized in this investigation.

44. Defendant General Motors paid Defendant Lucille Treganowan for the labor, parts and transmissions utilized in this investigation.

45. In June and July 1986, after the transmission work was completed in Pittsburgh, the transmissions were delivered to Detroit, Michigan.

46. The investigation conducted by General Motors, the State of Michigan, Lucille Treganowan and Fairfax Group Limited, continued until August 6, 1986, at which time certifications and registrations of Plaintiffs Jay Enterprise, Inc., J, J & T, Inc., Commercial Transmissions, Inc., and others, were summarily suspended by Order of the Secretary of State of the State of Michigan.

47. Prior thereto, all corporate Plaintiffs were duly certified and registered pursuant to the Michigan Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*, MSA 9.1720(1).

48. On or about August 12, 1986, following the summary suspensions, a massive display of publicity and public statements were generated by the officials of the State of Michigan, in concert with the General Motors Corporation, intentionally directing the public to avoid use of chain transmission facilities, including Plaintiffs' facilities, and send their transmission business back to the General Motors dealerships, based upon the results of an investigation conducted by the Office of the Attorney General and the Bureau of Automotive Regulations.

49. The aforesaid acts of Defendants did not reasonably relate to the proper purposes, scope, activities and functions authorized by the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*.

COUNT I
DENIAL OF DUE PROCESS

50. Plaintiffs adopt by reference paragraphs 1 through 49.

51. As a direct and proximate result of the aforesaid events, all Plaintiffs suffered a dramatic decrease in their businesses.

52. Pursuant to the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*., Plaintiffs had a property interest in their registration and certification to engage in the transmission repair business, subject to divestiture only after an adequate notice and a meaningful opportunity to be heard or after a finding of irreparable public harm requiring immediate action.

53. Plaintiffs had fundamental property interests in their right to conduct their businesses and their right to earn a living, subject only to such reasonable regulations, as were necessary for the public good.

54. Plaintiffs had a fundamental liberty interest in their good names, reputations, honor and integrity.

55. Plaintiffs' aforesaid property interests in their registration, certification and right to conduct business were subject to regulation and divestiture based only upon relevant considerations and supported by substantial evidence free of arbitrariness, capriciousness or unreasonableness.

56. Plaintiffs had rights pursuant to the Michigan Constitution 1963, Art. 1, § 17, and, under 42 U.S.C. § 1983, pursuant to the Fourteenth Amendment to the United States Constitution, not to be deprived of their aforesaid

property and liberty interests without substantive and procedural due process of law.

57. Defendants General Motors Corporation, Lucille Treganowan, Transmissions by Lucille and Fairfax, by their aforesaid acts and decisions, recklessly or intentionally, conspired with and/or acted jointly with the State of Michigan and its policymaking agents, under color of law and policy, to deprive Plaintiffs of their above-described substantive and procedural due process rights.

58. Plaintiffs directly and proximately suffered a deprivation of their above-described property and liberty interests without substantive or procedural due process as a result of the acts of all Defendants.

59. Pursuant to the Michigan Constitution 1963, Art. 1, § 17 and through 49 U.S.C. § 1983 pursuant to the Fourteenth Amendment of the United States Constitution, the private Defendants are accordingly liable to Plaintiffs for damages, and, pursuant to the Michigan Constitution 19673, Art. 1, § 17, the public Defendants are liable to Plaintiffs for damages, including:

(a) Loss of Plaintiffs' business, good will and reputation in the community;

(b) Damage to the reputations and good names of all Plaintiffs, both in the eyes of the community as business people and in the eyes of the members of the community, both personally and as honest businessmen;

(c) Deprivation of the licenses, certifications, and right of all Plaintiffs to conduct their business;

(d) Resulting economic loss to all Plaintiffs;

(e) Resulting non-economic, emotional distress, embarrassment, reputation damage and humiliation suffered by all individual Plaintiffs; and

(f) Punitive damages.

COUNT II
FRAUD

60. Plaintiffs hereby adopt by reference paragraphs 1 through 59.

61. All Defendants, by their aforesaid acts and decisions, recklessly or intentionally, represented that Plaintiffs committed unfair and deceptive practices, in violation of the Motor Vehicle Service and Repair Act.

62. That the aforesaid representations were false.

63. That when the private Defendants conspired with and acted jointly with the State of Michigan Defendants in making these false representations, Defendants knew that it was false or made the aforesaid representation recklessly and without any knowledge of its truth.

64. When Defendants conspired with and acted jointly with each other to make the aforesaid representations, Defendants acted with the intentions that Plaintiffs should rely and respond accordingly to the aforesaid false representations.

65. Plaintiffs did rely on the aforesaid representations and did then act in reliance upon said representations.

66. As a direct and proximate result of their reliance upon the aforesaid false representations, Plaintiffs suffered injury, including:

(a) Defending themselves against what Plaintiffs believed to be a legitimately motivated administrative proceeding and a legitimately motivated civil proceeding brought by the State of Michigan against Plaintiffs;

(b) Loss of Plaintiffs' business reputation;

(c) Economic loss to all Plaintiffs;

(d) Non-economic emotional pain and suffering by all individual Plaintiffs.

COUNT III
INJURIOUS FALSEHOOD

67. Plaintiffs adopt by reference paragraphs 1 through 66.

68. Private Defendants, by their aforesaid acts and decisions, recklessly or intentionally conspired with or acted jointly with the State of Michigan Defendants to cause to be published false statements affecting Plaintiffs.

69. Defendants intended the aforesaid false statements to result in harm to the pecuniary interests of Plaintiffs or, Defendants should have recognized that their aforesaid acts were likely to result in harm to the pecuniary interests of Plaintiffs.

70. Defendants knew that these statements were false or Defendants acted in reckless disregard of their truth or falsity.

71. As a direct and proximate result of Defendants' acts, Plaintiffs suffered pecuniary loss, including:

(a) Economic loss from the profits lost by their business; and

(b) Economic loss in the damages to Plaintiffs' business good will.

COUNT IV
TORTIOUS INTERFERENCE WITH
ADVANTAGEOUS BUSINESS RELATIONSHIP

72. Plaintiffs adopt by reference paragraphs 1 through 71.

73. Prior to the aforesaid acts of all Defendants, Plaintiffs possessed a valid business relationship or expectancy with potential customers in the marketplace for transmis-

sion repair work and with prior and then existing customers with whom they had established business relationships.

74. All Defendants knew or should have known of the aforesaid business relationships or expectancies.

75. All Defendants recklessly or intentionally conspired to intentionally interfere with the aforesaid business relationships or expectancies, which interference induced or caused the termination of said relationships or expectancies.

76. As a direct and proximate result of the acts of Defendants, Plaintiffs suffered damages, including:

(a) A disruption and termination of Plaintiffs' existing relationships with customers;

(b) A disruption and termination of expectancies and relationships with potential and future customers of Plaintiffs.

COUNT V
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

77. Plaintiffs adopt by reference paragraphs 1 through 76.

78. All Defendants conducted their aforesaid acts in an extreme and outrageous manner. As a direct and proximate result of the aforesaid extreme and outrageous conduct of all Defendants, the individual Plaintiffs suffered severe emotional distress and continue to suffer severe emotional distress to this date.

WHEREFORE, Plaintiffs pray that they be awarded damages, actual, special and exemplary, in whatever amount in excess of $10,000.00 that they may be found entitled to, plus their lawful fees and costs of pursuing this action.

JURY DEMAND

NOW COMES Plaintiffs, by and through their respective counsel, and hereby demand a trial by jury in the above-captioned matter.

Respectfully submitted,

By: /s/ Martin E. Crandall (P26824)

By: /s/ Janice A. Kyko (P33914)
650 First National Building
Detroit, MI 48226

By: /s/ Mark R. Bendure (P23490)
577 E. Larned, Suite 210
Detroit, MI 48226

By: /s/ James J. Williams (P26727)
1700 N. Woodward Ave., Ste. A
P. O. Box 587
Bloomfield Hills, MI 48013

Dated: *7-18-89*

AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST*

(United States of America — Federal Trade Commission)

(Dated November 15, 1982)

(In the Matter of GENERAL MOTORS CORPORATION, a corporation – DOCKET NO. 9145)

The Agreement herein, by and between General Motors Corporation, a corporation, hereinafter sometimes referred to as respondent, by its duly authorized officer, and its attorneys, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent General Motors Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 West Grand Boulevard, in the City of Detroit, State of Michigan.

2. Respondent has been served with a copy of the Complaint issued by the Federal Trade Commission, charging it with violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1980), and has filed an answer to said Complaint denying said charges. General Motors denies the acts and practices alleged in paragraphs 5 through 10 of the Complaint, and continues to deny that such acts and practices violate Section 5 of the Federal Trade Commission Act.

3. Respondent admits all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondent waives:

(a) any further procedural steps;

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*[*Printer's Note*]: All attachments referred to in this Order have been omitted in this reproduction.

(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

5. This Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Agreement is accepted by the Commission, it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Agreement and so notify the respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the said copy of the Complaint issued by the Commission.

7. This Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may, without further notice to respondent: (1) issue its decision containing the following Order to Cease and Desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the Order to Cease and Desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to Order to respondent's

address as stated in this Agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The Complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the Agreement may be used to vary or contradict the terms of the order.

8. Respondent has read the Complaint and the Order contemplated hereby. It understands that once the Order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the Order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

ORDER

Definitions

For the purposes of this Order, the following definitions shall apply:

A. "General Motors" – General Motors Corporation, and its successors, assigns, officers, representatives, agents, and employees, acting directly or through any corporation, subsidiary, division, or other device.

B. "Vehicle" – A General Motors passenger car or light truck with a gross vehicle weight rating no greater than 10,000 pounds.

C. "Specified Components" – The following components manufactured through the date the Commission accepts this agreement pursuant to Section 3.25(f) of the Commission's Rules of Practice:

(1) THM 200 automatic transmissions;

(2) camshafts or lifters in 305 or 350 cubic-inch displacement ("CID") gasoline engines produced in

plants operated by General Motors Chevrolet Division since 1974;

(3) fuel injection pumps or fuel injectors in 350 CID diesel engines produced in plants operated by General Motors Oldsmobile Division.

D. "Dealer" – Any person, partnership, firm, or corporation which, pursuant to a Dealer Sales and Service Agreement with General Motors, purchases or receives on consignment from General Motors vehicles for resale or lease to the public, including partnerships, firms, or corporations owned or operated by General Motors.

E. "Product Service Publication" ("PSP" or "Bulletin") – A document or an article in a document issued from time to time by General Motors car or truck divisions to their dealers or to dealers' employees, which describes or recommends:

(1) diagnostic, repair, or maintenance procedures;

(2) additional parts or upgraded or different replacement parts;

(3) non-repair information regarding the use and care of vehicles.

Examples of PSPs are: "Dealer Service Technical Bulletins," "Dealer Technical Bulletins;" and some articles in "Service Guild," "Service News," and "Dealer Service Information Bulletins," depending on the practice of the division issuing the PSP. The term "PSPs" includes other documents bearing different titles, but which are substantially the same in content and purpose. If a document (such as "Service News" and "Service Guild") contains several articles, any one of which describes unrelated diagnostic, repair, or maintenance procedures, then each such article shall be

considered to be an individual PSP. PSPs do not include shop service manuals or parts manuals.

F. "Product Condition" – The condition of a vehicle that gives rise to any repair, maintenance, or diagnostic procedures, or that gives rise to the use of additional parts, described in PSPs.

G. "PSP Index" – A document, clear and comprehensible to prospective purchasers and vehicle owners, which has entries for all PSPs published each model year by the applicable General Motors car or truck divisions.

(1) For each entry in the PSP Index, the following information will be readily understandable:

(a) the particular model(s) and model year(s) to which the entry applies or potentially applies;

(b) the subject of the PSP;

(c) the major component or system of components to which the PSP relates;

(d) the identifying number of the PSP to which the entry relates; and

(e) how to obtain that PSP from General Motors and its dealers.

(2) The PSP Index shall contain PSP Explanatory Information, subject to the provisions of paragraph D(2) of section I, and the PSP Explanatory Information shall be appropriately referenced in the PSP Index entry, when any of the following criteria is met:

(a) the PSP describes repair, maintenance, or diagnostic procedures not previously specifically covered in the applicable shop service manual, either (i) where the cost of such

procedures to a customer is reasonably expected to exceed the reference cost, or (ii) where the procedures are intended and designed to prevent future repair or replacement costs reasonably expected to exceed the reference cost; or

(b) the PSP describes revisions to repair, maintenance, or diagnostic procedures in the existing shop service manual where the revisions are intended and designed either (i) to prevent future repair or replacement costs reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(c) the PSP describes modified (including additional, different, or upgraded) parts recommendations,where the modification is intended and designed either (i) to prevent future repair or replacement costs reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(d) the PSP describes (i) information revising or updating owner's manuals or maintenance schedules or (ii) non-repair information regarding the use and care of vehicles by vehicle owners and operators.

H. "PSP Explanatory Information" – Information related to a particular PSP, that includes all of the following items as applicable:

(1) a description of the product condition and the engine size and transmission type (automatic or manual);

(2) a description of the major symptoms indicating the product condition;

(3) the steps or possible steps that can be taken to minimize or avoid the product condition;

(4) a statement that upgraded or different parts are called for to correct the product condition, if such is the case; if no such parts are involved, a statement that the repair or maintenance procedure discussed in the PSP has to be repeated if such is the case;

(5) a statement of the immediate and long-range performance consequences; and if avoidance of repair costs is a reason for undertaking the procedure, a statement of the estimated repair costs if known, or, if not known, a characterization of the costs of not performing the procedures in a timely manner;

(6) where available, the estimated labor time and an estimated range of retail labor rates, as well as a list of the major parts required to correct the product condition;

(7) a description of the underlying PSP(s) sufficient to permit an interested person to identify and order the PSP(s) from General Motors; and

(8) a disclosure of the primary benefit(s) of this information, if the PSP contains information not related to a product condition, such as some PSPs meeting the criteria set forth in paragraph G(2)(d) of this Definition section.

Provided, however, that for PSPs relating to use and care information or to product conditions about which General Motors notifies all affected owners directly and in writing, the owner letter may be used in lieu of PSP Explanatory information.

I. "Costs" –

1. "Reference Cost" in paragraph G(2) of this Definition section means one hundred fifty dollars ($150), adjusted in the month when this Order is served and, annually thereafter, by a ratio, the numerator of which is the most recently published quarterly "Implicit Price Deflator" for the Gross National Product (IPD), and the denominator of which is the IPD for the last quarter of 1982, adjustments to be rounded to the nearest dollar. IPDs used in these annual adjustments shall have been computed using the same base year.

2. "Cost(s)" other than "reference cost" in paragraph G(2) of this Definition section shall be calculated by adding the suggested retail price for parts which are or may be required and the applicable national average dealer warranty labor rate charges multiplied by the time required to effectuate the repair, replacement, diagnosis or maintenance as determined by the labor time guide for the applicable General Motors division.

J. "Third-Party Arbitration Program" – The program by which General Motors, through an impartial third-party administrator, permits any individual vehicle owner in the United States to submit an unresolved complaint for resolution by mediation, and, if mediation efforts fail, by arbitration administered by the third-party administrator.

K. "Powertrain Components" –

(1) *Gasoline and diesel engines.* Cylinder blocks and heads, and all internal parts, including camshafts and lifters, manifolds, timing gears, timing gear chains or belts and covers, flywheels, harmonic balancers, valve covers, oil pans, oil pumps,

engine mounts, seals and gaskets, water pumps and fuel pumps, and diesel injection pumps; also, turbocharger housings and internal parts, turbocharger valves, seals and gaskets.

(2) *Transmissions.* Cases and all internal parts, torque converters, vacuum modulators, seals and gaskets, and transmission mounts; also, transfer cases and all internal parts, seals and gaskets.

L. "Background Statements" – Those statements included in the Special Implementing Provisions to the General Motors Zone Handbook For Third-Party Arbitration (Attachment B to this Order), titled "Background Statement THM 200 Transmissions," "Background Statement Diesel Fuel Injection Systems," and "Background Statement Camshafts and Lifters."

I

IT IS ORDERED that respondent General Motors, its successors, assigns, officers, representatives, agents, and employees, acting directly or through any corporation, subsidiary, division, or other device, (elsewhere in this order, "respondent" or "General Motors"), in connection with the advertising, offering for sale, sale, or distribution of any vehicle in or affecting commerce in the United States, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. By January 1984, or by the date of service of this Order, whichever is later, failing to prepare and issue PSP Indexes for the 1982 and 1983 model years, and thereafter failing to prepare and issue PSP Indexes for each model year.

B. Beginning with the 1984 model year, failing to disclose for each model year, in a clear and conspicuous

manner, in each vehicle owner manual (where it shall be itemized in the Table of Contents) published by General Motors for each of its vehicle lines:

(1) the following statement –

Updated Service Information You Can Obtain

(Division) regularly sends its dealers useful service bulletins about (Division) products. (Division) monitors products performance in the field. We then prepare bulletins for servicing our products better. Now, you can get these bulletins, too.

Bulletins cover various subjects. Some pertain to the proper use and case of your car (truck). Some describe costly repairs. Others describe inexpensive repairs which, if done timely, with the latest parts, may avoid future costly repairs. Some bulletins tell a mechanic how to repair a new or unexpected condition. Others describe a quicker way to fix your car (truck). They can help a mechanic service your car (truck) better.

Most bulletins apply to conditions affecting a small number of cars (trucks). Your (Division) dealer or a qualified mechanic may have to determine if a specific bulletin applies to your car (truck).

You can subscribe to all (Division) bulletins. This way you'll get them as they come out. You can wait a while and get an index to the bulletins. The index summarizes some of the more important bulletins. You can also get individual bulletins. However, you'll need the index to identify them.

(2) the above statement shall in addition provide at least the following information in clear and comprehensible language –

(a) concerning indexes –

(i) Indexes list each PSP, provide ordering information for individual PSPs, and are cumulatively updated quarterly for each model year.

(ii) Indexes contain plain-language highlights and summaries of PSPs describing costly repairs, designed to prevent costly repairs, or containing owner use and care information.

(iii) They are free for model years 1982-1985; if there is a charge thereafter, it shall be credited against any charge for PSPs ordered.

(iv) Most PSPs applicable to a new car will be listed in the last quarter's index for that car's model year. Some may also appear in indexes for the next model year; and a few may appear in subsequent years.

(v) When consumers order any index, they will receive the latest applicable index for the model year of their car unless they request an index for a different model year.

(b) concerning PSPs –

(i) The cost of individual PSPs, if any, and how to order them.

(c) concerning subscriptions –

(i) The cost of subscriptions and how to order them.

(ii) The subscriber is entitled to all PSPs published by a division during a model year.

(d) concerning ordering –

(i) An ordering coupon to obtain a properly identified index, PSP, or subscription.

(ii) The toll-free telephone number described in paragraph C of section II.

(iii) A statement that informs owners that they can inspect copies of the indexes and individual PSPs at a participating dealership.

(3) the following statement, which shall be made in conjunction with the statement described above, but which shall not precede disclosure of the information described in paragraphs B(2)(a)(i) and B(2)(a)(ii) –

These bulletins are meant for mechanics. They are NOT meant for the do-it-yourselfer. Mechanics have the equipment, tools, safety instructions, and know-how to do a job quickly and safely.

C. Beginning with the 1984 model year, failing to disclose, for each model year, in a clear and conspicuous manner in the principal point-of-sale catalog published by General Motors for each of its vehicle lines the following statement:

A Word About Updated Service Information

(Division) regularly sends its dealers useful service bulletins about (Division) products. (Division) monitors product performance in the field. We then prepare bulletins for servicing out products better. Now you can get these bulletins, too. Ask your dealer. To get ordering information, call toll-free _____.

D. Failing to mail, or cause to be mailed, upon written request accompanied by any applicable fee specified in section II, any of the following:

(1) information describing PSPs, PSP Indexes, and PSP subscriptions, as well as how to obtain each;

(2) the most current PSP Index for the particular General Motors vehicle division and model year identified in the request, provided that the PSP Explanatory Information in the PSP Index may be limited to the particular vehicle make, model and model year identified in the request; or

(3) in accordance with the terms of paragraph A of section II, any specifically identified PSPs, or a subscription to all PSPs for a current model year.

Provided that, General Motors need not make available a PSP or PSP Index issued in a model year four (4) or more years prior to the model year in which the request is received.

E. Failing to mail, or cause to be mailed, upon oral request received pursuant to a toll-free telephone procedure of the kind described in paragraph C of section II, information describing (1) PSPs, (2) PSP Indexes, and (3) PSP subscriptions, as well as ordering materials or coupons which can be used to order each.

F. Failing to furnish each dealer with each PSP and all PSP Indexes, and with binders, containers, index tabs, or other materials which enhance the accessibility of such materials at each dealership. General Motors need only furnish each dealer with the PSPs and PSP Indexes related to the vehicles manufactured by the division(s) represented by that dealership.

G. Beginning with the 1984 model year, and once in each 6-month period thereafter, failing to recommend and urge, in writing, that each dealer:

(1) place the display posters, referenced in paragraph B of section II, in conspicuous and accessible locations within the dealers' showrooms, service waiting areas, service payment areas or parts departments, and request replacement posters from General Motors, as needed;

(2) provide to requestors, in a form which may be retained, the PSP Index for a particular vehicle, make, model, end model year, and provide specifically identified PSPs and information how to order subscriptions to all PSPs for a particular model year, free or on reasonable terms; and

(3) provide members of the public with ready access to the PSPs and PSP Indexes furnished to those dealers.

H. Failing to include detailed information regarding General Motors third-party arbitration program described in section IV, and the PSP program described in this section, in ongoing training programs and training materials for dealers on subjects related to service and customer relations, beginning not later than one hundred eighty (180) days after service of this Order and continuing for the duration of this Order.

I. Failing to continue General Motors program of issuing PSPs in a manner comparable to the program as it existed during the period 1976 through 1981. Such program shall continue to take into account criteria for issuing PSPs such as frequency, repair, cost, and significance of product conditions.

J. Failing to prepare and issue an entry in the PSP Index for each PSP issued, and to include such entry in an

updated PSP Index. PSP Indexes must be cumulatively updated quarterly for each model year, and must include no less than all PSP Index entries for all PSPs issued between the start of the model year and one month prior to the update, provided that there must be one PSP Index for each model year that includes an entry for every PSP issued in that model year. The updated PSP Indexes must be forwarded to dealers and be available from General Motors within four months after issuance to dealers of any PSP which was not included in a prior Index.

II

IT IS FURTHER ORDERED that:

A. Beginning with the 1984 model year, General Motors shall implement a program whereby each person may obtain specified PSP Indexes, individual PSPs, or yearly subscriptions to all PSPs issued for a particular General Motors division in a model year. Subject to the limitations of this section, General Motors may, at its option, impose a reasonable charge. Any charge for a PSP Index must be credited toward the initial purchase of PSPs themselves. The maximum charges shall be as follows:

(1) For PSP Indexes ordered in

(a) model years prior to 1986, no charge;

(b) model years 1986 through 1988, a charge not to exceed two dollars ($2.00) per any PSP Index;

(c) model years 1989 and thereafter, a charge not to exceed three dollars ($3.00) per any PSP Index.

(2) For individual PSPs ordered in

(a) model years prior to 1986, a charge not to exceed three dollars ($3.00) for the first PSP requested in each order and one dollar ($1.00) for each additional PSP requested in that order;

(b) model years 1986 and thereafter, a charge not to exceed four dollars ($4.00) for the first PSP requested in each order and two dollars ($2.00) for each additional PSP requested in that order.

(3) For PSP subscriptions for a given model year, a charge not to exceed reasonable cost or equal to the charge (if any) to dealers.

B. In the 1984 model year, General Motors shall furnish to each of its dealers three display posters at least 24" × 36" in size promoting the existence, availability, and benefits of General Motors PSPs and PSP Indexes. Thereafter, General Motors shall furnish additional copies of these posters upon request by any dealer.

C. Within thirty (30) days after the date of service of this Order, General Motors shall establish and maintain a toll-free telephone system designed to accommodate the volume of telephone calls which result from the disclosures made pursuant to this Order. Said system shall provide that, after obtaining the caller's name and address, the person receiving the call shall cause to be mailed to the caller the materials described in paragraph E of section I or paragraph E of section IV as appropriate. If the materials described in paragraph E of section I are to be sent, General Motors shall instruct the person receiving the call to state that the caller's dealer may have PSPs and PSP Indexes available for the caller's convenience.

III

IT IS FURTHER ORDERED that:

A. At least four (4) times in the 1984 model year and two (2) times in each model year thereafter, General Motors shall place and cause to be disseminated four-color, full-page advertisements in national magazines. Each time such advertisements are placed, the magazines must have a combined total non-duplicated readership (i.e., "net reach") of at least seventy-five million (75,000,000) adults, as measured or verified by an outside organization generally recognized as competent and experienced in this field and used by General Motors or its advertising agencies for other advertising research. The demographic characteristics for the combined readership of the magazines selected for such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of General Motors vehicles. Such advertisements may be tied into existing advertising themes, but must be devoted exclusively to explaining and promoting the existence, availability and benefits of PSPs and PSP Indexes. In addition, such advertisements must disclose that PSP Indexes are free, if such is the case; must prominently show the toll-free telephone number required by paragraph C of section II; and must include an order form to obtain PSP Indexes.

B. At least two (2) times in the 1984 model year, two (2) times in the 1985 model year, and three (3) times in each model year thereafter, General Motors shall place and cause to be disseminated full-page advertisements in national magazines. Each time such advertisements are placed, the magazines must have a combined total non-duplicated readership (i.e., "net reach") of at least seventy-five million (75,000,000) adults as measured or

verified by an outside organization generally recognized as competent and experienced in this field and used by General Motors or its advertising agencies for other advertising research. The demographic characteristics for the combined total readership of the magazines selected for such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of General Motors vehicles. Such advertisements must contain a principal message devoted to explaining and promoting the existence, availability, and benefits of General Motors third-party arbitration program provided for in sections IV and V, and must conspicuously disclose the toll-free number required by paragraph C of section II. Each advertisement placed after the date of execution of this Order and before the date of service of this Order, if such advertisements meet all the requirements of this paragraph but for the fact that the advertisements were placed prior to the date of service of this Order, shall reduce on a one-for-one basis the requirement to place advertisements during the last three (3) years of the duration of this Order.

C. (1) Prior to the placement of the first advertisement required by paragraph A, and prior to the placement of any subsequent advertisements differing substantially in content or format from that first advertisement, General Motors shall conduct copy testing of such advertisement(s). The copy testing shall be based on monadic interviews (such as the "mall intercept" procedure) of subjects screened and selected so as to be representative of owners of General Motors vehicles purchased new, and shall be designed and implemented in accordance with General Motors usual procedures for such testing under the direction of an outside research organization

or consultant generally recognized as competent and experienced in this field and used by General Motors for other advertising research. Said organization or consultant shall submit to General Motors a report on the effectiveness of the tested advertisement, and said advertisement shall meet General Motors obligations under this section if said report concludes that the advertisement, measured in relation to advertisements for comparable automotive product information, effectively communicates:

(a) that General Motors makes information available to consumers, for 1982 and subsequent model years, which describes or recommends diagnostic, repair, or maintenance procedures for product conditions, or contains information about the use and care of vehicles; and

(b) how consumers can obtain PSP subscriptions and PSP Indexes.

Unless otherwise specified by this Order, the testing of advertisements described in this paragraph shall adhere to the standards set forth in "PACT: Positioning Advertising Copy Testing (A Consensus Credo representing the views of leading American Advertising Agencies)," dated January 1982.

(2) Prior to the placement of the first advertisement required by paragraph (B), and prior to the placement of any subsequent advertisements differing substantially in content from that first advertisement, General Motors shall conduct, or cause to be conducted, copy testing of said advertisement(s) using a population representative of

owners and potential purchasers of General Motors vehicles, and employing a so-called "Group-Depth Interview" or "Focus Group" method of copy testing, designed and implemented in accordance with General Motors usual procedures for such research under the direction of an outside research organization or consultant generally recognized as competent and experienced in this field and used by General Motors for other advertising research. Said organization or consultant shall submit to General Motors a report on the effectiveness of the tested advertisement(s), and the advertisement(s) shall meet General Motors obligations under this paragraph if, on the basis of said report and applying criteria customarily applied to General Motors service advertising or advertising for comparable complaint resolution programs, the advertisement(s) effectively communicates:

(a) that General Motors is offering to submit complaints concerning its vehicles to a third-party arbiter; and

(b) how consumers can obtain information about the third-party arbitration program.

D. Beginning with the 1984 model year, in any proprietary magazine sent by General Motors vehicle divisions to a primary target audience of division vehicle owners, General Motors shall annually include a full-page advertisement containing the disclosure statements set forth in paragraph B of section I, or the substantial equivalents thereof, concerning the same information.

IV

IT IS FURTHER ORDERED that:

A. General Motors shall implement a nationwide third-party arbitration program to settle complaints of individual owners relating to powertrain components.

B. Such third-party arbitration program shall be binding on General Motors, but non-binding on consumers unless a consumer elects to accept an arbitration award.

C. Such third-party arbitration program shall be conducted in accordance with (1) the Uniform Rules for Arbitration published by the Better Business Bureau; (2) the Zone Handbook for Third-Party Arbitration (Attachment A to this Order), as modified by the special implementing provisions (Attachment B to this Order); and (3) the General Motors Consumer Arbitration Handbook (Attachment C to this Order). The special implementing provisions (Attachment B to this Order) shall not be modified without prior Commission approval insofar as the provisions apply to arbitration involving specified components. For two years after the date of service of this Order, such third-party arbitration program shall be conducted at no charge to the consumer by General Motors or the third-party arbitrator. Thereafter, no charge shall be imposed on consumers by General Motors or the third-party arbitrator that exceeds charges specified in the Uniform Rules of Arbitration published by the Better Business Bureau. The General Motors Consumer Arbitration Handbook (Attachment C to this Order) shall effectively communicate that if a consumer accepts an arbitration award, the consumer cannot seek reimbursement from General Motors for the same problem through the use of other legal proceedings.

D. Such third-party arbitration program shall be fully operational in the cities identified in Attachment D no later than sixty (60) days after the date of service of this Order, and thereafter expanded as demands on

the program may require to resolve consumer complaints expeditiously. The expansion shall be designed and implemented so that owners who elect to arbitrate complaints about specified components can obtain their arbitration hearing within sixty (60) days of their election (exclusive of periods of delay attributable to the consumer) unless extraordinary circumstances justify a longer period in individual instances.

E. General Motors shall mail or cause to be mailed, either upon written request or oral request received pursuant to a toll-free telephone procedure of the kind described in paragraph C of section II, a handbook explaining the details of General Motors third-party arbitration program (Attachment C to this Order).

F. General Motors shall include in a letter to each dealer, once in each 6-month period, a clear and conspicuous reminder to dealers regarding disclosure of the availability of General Motors third-party arbitration program.

V

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date of service of this Order, General Motors shall contact, by first-class mail, each attorney general's office (or such other office as may be appropriate) of the fifty states and the District of Columbia, and shall:

(1) Provide each such office with a copy of this Order.

(2) Describe General Motors third-party arbitration program.

(3) Describe the PSPs and PSP Indexes and how consumers can obtain them.

(4) Inform each such office that General Motors will, if the appropriate office wishes, notify by first-class mail each person who has complained to that office about a specified component, and that General Motors will provide that person with:

(a) information about the availability of General Motors third-party arbitration program;

(b) one or more of the appropriate Background Statements when any specified component has been identified; and

(c) information about PSPs and PSP Indexes and how to obtain them.

(5) Request that each such office provide General Motors with (a) a copy of each complaint concerning a specified component; or, at the option of that office, (b) the owner's name and address, and the identity of the specified component or components.

(6) Inform each such office that General Motors will also send, by first-class mail, a notice to any person who has complained to any other state or local law enforcement or consumer affairs office about a specified component, and urge such office to encourage state and local law enforcement or consumer affairs offices to forward to General Motors either copies of such complaints, or, at the option of the forwarding office, a list of the names, addresses, and the identity of the specified component or components;

B. Within sixty (60) days after receipt of any complaint or the complainant's name and address, from any office solicited pursuant to paragraph A of section V, or any complaint concerning a specified component or the

complainant's name and address from the Federal Trade Commission, General Motors shall send to that complainant, by first-class mail:

(1) one or more of the appropriate Background Statements when any specified component has been identified;

(2) a statement which clearly and conspicuously discloses information about the availability of General Motors third-party arbitration program, including the statements contained in Attachment E;

(3) a statement which clearly and conspicuously discloses information about the availability of PSPs and PSP Indexes.

C. Within sixty (60) days after the date of service of this Order, General Motors shall send by first-class mail to any person who has an open or unsatisfactorily resolved complaint and who, prior to the date of service of this Order, had notified General Motors about a specified component, and whose name and address have been retained by General Motors, the information contained in paragraphs B(1), (2), and (3) above.

D. Within thirty (30) days of service of this Order, General Motors shall provide to appropriate General Motors employees, including employees at the zone offices and headquarters of the car and truck divisions who have responsibility for receiving and responding to consumer complaints, written instruction stating that all consumers who identify a specified component in any oral or written complaint received after the date of service of this Order must be sent, by first-class mail, a letter providing the information contained in paragraphs B(1), (2), and (3) above.

E. General Motors shall obtain, maintain, and retain for a period of four (4) years from the date of service of this Order, the following records for specified documents.

(1) the results of each mediation pursuant to the procedure described in section IV including the terms of any settlement and, where available, the terms of any proposed settlement of a complaint;

(2) copies of each arbitration decision, including, where available, the reasons for the decision; and

(3) documents showing all requests for arbitration made by vehicle owners, the dates of such requests, and the dates of all arbitration hearings.

VI

IT IS FURTHER ORDERED that sections I, II, III, IV and V of this Order shall expire eight (8) years after the date of service of this Order; *provided*, that if at any time during which said sections remain in effect, the Commission issues a final trade regulation rule imposing obligations on the automobile industry comparable to those imposed under any such section(s), such section(s) shall terminate upon the effective date of such rule, and, in such event, General Motors shall advise the Commission of its intention to rely upon any such rule as having terminated and superseded such section(s) of this Order thirty (30) days in advance of reliance thereon; *provided further*, that if at any time during which such section(s) remain in effect, the Commission issues a final guide under Sections 1.5 and 1.6 of the Commission's Rules of Practice imposing obligations on the automobile industry comparable to those imposed under any such section(s), then the Commission shall, upon General Motors motion or upon the Commission's own motion, re-open this proceeding within one hundred twenty (120) days of such motion, and, within a reasonable time thereafter, vacate

any such section(s) of this Order, unless the Commission finds that such action is not required by changed conditions of law or fact or is not in the public interest; and *provided further*, that nothing herein shall preclude General Motors at any time from moving the Commission to alter, modify, or set aside this Order under the Commission's Rules of Practice.

VII

IT IS FURTHER ORDERED that:

A. General Motors shall, within sixty (60) days after the date of service of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

B. General Motors shall, within one hundred twenty (120) days after the implementation of the PSP program pursuant to section I of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which General Motors has complied with this Order.

C. During the time that sections I, II, III, IV and V remain in effect, General Motors shall retain and transmit to the Commission upon reasonable request:

(1) a copy of each PSP Index required by paragraphs A and J of section I, and a copy of each PSP;

(2) copy-test results of advertisements disseminated pursuant to section III; and

(3) a copy of each poster furnished to dealers pursuant to paragraph B of section II.

D. Once during the term of this Order, General Motors shall file with the Commission a report, in writing, setting forth in good faith its best estimates of:

(1) the costs and benefits, to General Motors and to the public, of the obligations imposed by this Order; and

(2) the extent to which dealers have displayed posters furnished to them pursuant to paragraph B of section II and have provided access to PSPs and PSP Indexes furnished by General Motors as required by paragraphs A and J of section I.

Said report shall be filed within six (6) months of General Motors receipt of a request therefor from the Commission or its staff, and shall cover the period from the date of service of this Order until the date of said request. General Motors shall make available for inspection on reasonable notice by authorized representatives of the Federal Trade Commission, all underlying documents and data relating to the "cost and benefits" portion of said report and used in the preparation of said report. If copies of any such materials are requested by Commission representatives, General Motors may, at its option, either make such materials available to such representatives for copying purposes, or provide copies at either (a) rates the Commission charges for copies of materials released pursuant to the Freedom of Information Act, or (b) General Motors costs, whichever is lower.

E. General Motors shall retain records relative to the manner and form of its continuing compliance with sections I, II, III, IV and V for a period of three (3) years, and make said records available for inspection upon reasonable notice by authorized representatives of the Federal Trade Commission. If copies of any such records are requested by such representatives, General Motors may, at its option, either make such records available for copying purposes or provide copies at either (a) rates the Commission charges for copies

of records released pursuant to the Freedom of Information Act, or (b) General Motors costs, whichever is lower.

F. During the time that sections I, II, III, IV and V remain in effect, General Motors shall notify the Commission prior to any change in General Motors corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

VIII

IT IS FURTHER ORDERED that the provisions of this Order shall be limited in their application to the United States.

Signed this 15th day of November, 1982.

GENERAL MOTORS CORPORATION,
a corporation.
By: /s/ K. Potts,
Vice President-Group Executive
3044 West Grand Boulevard
Detroit, Michigan 48202

ATTORNEYS FOR GENERAL MOTORS:
By: /s/ OTIS M. SMITH,
Vice President-General Counsel
/s/ THOMAS B. LEARY
/s/ FRANCIS H. DUNNE
/s/ DAVID A. COLLINS

COUNSEL FOR FEDERAL TRADE COMMISSION:
By: /s/ WILLIAM W. JACOBS,
Assistant Regional Director
/s/ JOHN M. MENDENHALL,
Attorney

By: /s/ RICHARD H. GATELEY,
Attorney
/s/ BRENDA W. DOUBRAVA,
Attorney
/s/ ROBERT P. WEAVER,
Attorney
/s/ WILLIE L. GREENE,
Consumer Protection Specialist
/s/ NOBLE JONES,
Consumer Protection Specialist
/s/ DAVID V. PLOTTNER,
Consumer Protection Specialist

APPROVED:
By: /s/ BARBARA E. ARNOLD,
Acting Director,
Cleveland Regional Office
/s/ TIMOTHY J. MURIS,
Director,
Bureau of Consumer Protection

DOCUMENTS REGARDING INITIAL INVESTIGATION

ATTORNEY GENERAL MEMORANDUM

(Dated January 24, 1986)

TO: Janice L. Levine
Assistant Attorney General
Consumer Protection Division

FROM: Rebecca A. Treaber
Investigator
Consumer Protection Division

Re: Independent Transmission

Entity: Perfection Foreign Car Repair, Inc.
Assumed Name: Independent Transmission
Resident Agent: James M. Schotten
Registered Address: 22330 Middlebelt
Farmington Hills, MI 48018
Date of Inc: December 14, 1982
CID=: 226-519

Allegation: Unnecessary transmission repairs were being effected.

Investigation:

January 17, 1986: I telephoned the Westland location of Independent Transmission at 32932 Ford Road in Westland, tx: 313/422-3270. I stated I had one of their older coupons for a transmission tune-up for $4.95 plus fluid and was interested in making an appointment. The respondent stated the coupon (which included a road test and automatic transmission fluid change) would still be honored, and that an appointment would not be necessary.

January 24, 1986: On this day I arrived at the Westland location of Independent Transmission, and again stated I had their coupon for the transmission tune-up. I dealt with

a man named Ron who seemed to be in charge. He took the coupon and asked for the mileage on the car, if I had had any problems, and whether the fluid had ever been changed before. To this I responded I was experiencing no problems with the car, and that I had purchased it used not knowing if the previous owner had ever changed the fluid.

Ron then had one of the mechanics take the car out for its road test. When he returned with the vehicle, the mechanic took it directly into a car stall.

The garage was not visible from the customer waiting area, and I was not invited into the garage area. After approximately 10 to 15 minutes, Ron went into the garage area. When he returned he informed me that everything looked fine. There was some clutch material in the bottom, but Ron stated that this was normal. He also stated the car looked as if it had been serviced before.

Ron then wrote up the bill (copy attached) and advised that the fluid should be changed once every year or 12,000 miles.

bm

cc: Fred Pirochta
cc: Bob Ianni
cc: Fred Hoffecker

N° 3995

Date: 2-6-86 | Name: Becky Teber | Home Phone: 544-8122 | Bus. Phone: | License:
Address: 960 E. Woodruff | City: H. Park | State: MI | Zip: 48030 | Year: 83 | Make: Pont | Model: [illegible]
Mileage: 000 | Serial Number: | Towed in by:
Owner Comment:

Final road test by:

RAD	NP	Y P	S S	WHS	REF	P C

FLUID CHECK — Svce Tech
CORRECT ☒ CLEAN ☐ WATER
HIGH ☐ BURNT ☐ VARNISH
LOW ☐ CONTAMINATED

ROAD TEST — Svce Tech
SPEEDO OK/NG · UP ENGAGE OK/NG · REV ENGAGE OK/NG
DRIVE OK/NG · REVERSE OK/NG · NOISE OK/NG
2-3 SHIFT OK/NG · KICKDOWN OK/NG · NEUTRAL SW OK/NG

ADJUST CHECK — Svce Tech
THROT. LINK OK/NG · VACUUM OK/NG · ADJUST OK/NG
MOUNTS OK/NG · AXLE OK/NG · UNIV JOINTS OK/NG

PAN EXAMINATION — Svce Tech
☐ CLEAN ☐ METAL ☐ VARNISH
☐ FRICTION ☐ OTHER ☐ WATER

DIAGNOSIS
☐ NO PROBLEM ☐ OTHER

☐ INTERNAL PERFORM INSPECT — Svce Tech: VM155243

UPON REQUEST OR WHERE STATE LAW REQUIRES, YOU ARE ENTITLED TO THE RETURN OF ALL PARTS REPLACED, EXCEPT THOSE WHICH ARE TOO HEAVY OR LARGE, AND THOSE REQUIRED TO BE SENT BACK TO THE MANUFACTURER OR DISTRIBUTOR BECAUSE OF WARRANTY WORK OR AN EXCHANGE AGREEMENT. YOU ARE ENTITLED TO INSPECT THE PARTS WHICH CANNOT BE RETURNED TO YOU.

American transmissions

COMMERCIAL TRANSMISSION INC.
DBA AMERICAN TRANSMISSION
4060 WASHTENAW
ANN ARBOR, MICHIGAN 48104
973-9021
Reg. No. 1113709

YOU ARE ENTITLED TO RECEIVE A COPY OF OUR QUOTATION SHEET WHICH SETS FORTH THE COST OF THE SERVICES WHICH WERE AVAILABLE TO YOU

PARTS – MATERIALS – UNITS	NUMBER	AMOUNT
ATF Fluid		5.00
PARTS TOTAL		5.00

CERTIFICATION — [illegible]

COMPLETION CERTIFICATE — Becky Miller — Customer's Signature

AUTHORIZATION — [illegible] — Becky Miller — Time — Phone — By

☐ INSPECTION SERVICE
• REMOVE & DISMANTLE
• INSPECT INTERNAL PARTS
• REASSEMBLE AND INSTALL
☐ RECEIVED COPY OF ESTIMATE

AUTHORIZATION DATE ______ TIME ______
FROM ______
BY ______
INSPECTION
DIAGNOSIS

	Hrs.	
Service		8.80

Paid Cash

☒ CASH	PARTS	5.00
☐ CHECK	SUB TOTAL	13.80
☐ CREDIT CARD	CREDIT	
☐ FINANCED	AMOUNT	13.80
☐ OTHER	TAX	.20
	TOTAL	14.00

Delivered by: [illegible] | Date: 2-6-86

[illegible] 2/7/86